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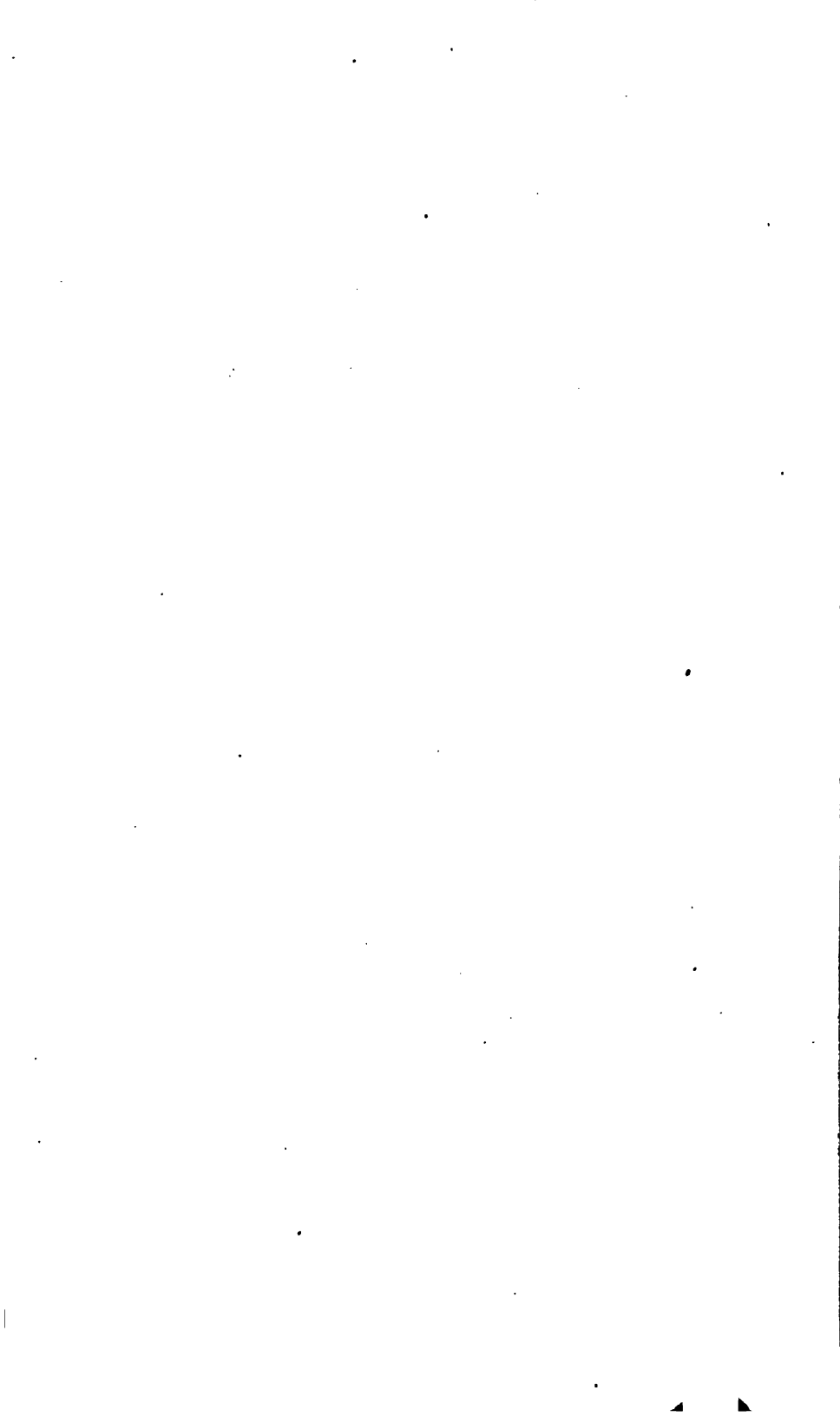
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AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN.

VOLUME 91.

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SCHEDULE

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(29)

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

CAMPBELL v. STATE.

[133 Ala. 81, 31 South. 802.]

EVIDENCE—Res Gestae.—Whenever Evidence of an act is in itself admissible as a material fact, and is so admitted, the declarations accompanying and characterizing the act are a part of the res gestae, and are admissible in explanation of the act. (p. 19.)

EVIDENCE—Res Gestae.—In a Prosecution for Murder, if evidence is introduced that the defendant went to the place where the deceased and another were engaged in a quarrel, and, participating therein, killed the deceased, declarations made by the defendant on starting for the scene of the altercation are admissible as part of the res gestae. (p. 19.)

JURY TRIAL.—Argumentative Instructions are properly refused. (p. 20.)

JURY TRIAL.—Instructions Postulating an Acquittal upon self-defense, which are argumentative, or which omit some constituent element of self-defense, are properly refused. (p. 20.)

The appellant Campbell was tried for killing one York, and was convicted of murder in the first degree. At the time of the homicide the deceased and Burrell Messer were engaged in a quarrel. Campbell walked up and spoke to the deceased. A few words passed between them, when the deceased knocked Campbell down, and the latter, as he arose, shot the deceased, killing him. It was shown that the deceased had made some threats toward Campbell a year or so before, but it was not shown that they had been communicated to Campbell. The defendant requested the court to give to the jury, among others, the following charges, and separately excepted to the court's refusal to give them: 1. "The court charges the jury that any threats made by deceased toward defendant, if such threats are shown

to have been made by deceased, whether recently made or not, may be considered by the jury in connection with all the other evidence in the case in determining whether or not there was real or apparent danger to defendant at the time he fired the fatal shot"; 4. "The court charges the jury that if the defendant approached the deceased in a quiet and orderly manner, that deceased replied to him in an angry manner, and knocked defendant down, and that defendant reasonably and honestly believed that deceased struck him with a pistol and reasonably and honestly believed that deceased had a pistol in his hand as defendant arose after he was knocked down, and that his purpose was to do defendant serious bodily harm, and the circumstances were such as to reasonably produce such belief in defendant's mind situated as defendant was at the time, and no reasonable and safe avenue of escape was open to defendant, then defendant had the right to anticipate his assailant and fire first, and this rule would not be changed even though it should turn out that defendant was mistaken as to his belief that deceased had a pistol in his hand"; 15. "The court charges the jury that if after looking at all the evidence in the case your minds are left in such a state of uncertainty that you cannot say beyond a reasonable doubt whether the defendant was at fault in bringing on the difficulty, and whether he acted upon the well grounded and reasonable belief that it was necessary to shoot and take the life of Arthur York to save himself from great bodily harm or death, or he shot before such impending necessity arose, then this is such a doubt as will entitle the defendant to an acquittal"; 23. "The court charges the jury that if the testimony points in two directions, one to the guilt of the defendant, and the other to his innocence, and both are equally reasonable, they are bound to accept that which points to his innocence and acquit the defendant, if they believe that phase of the testimony"; 25. "The court charges the jury that if the testimony shows two theories, one tending to the defendant's guilt and the other to his innocence, and both are reasonable, they must acquit the defendant, if they believe the theory tending to his innocence."

B. B. & W. H. Bridges and Merrill & Merrill, for the appellant.

Charles G. Brown, attorney general, for the state.

** DOWDELL, J. The defendant set up the plea of self-defense. The evidence was in conflict as to who was the ag-

gressor. The evidence without dispute showed that the killing occurred at the home of one Pruett, on the occasion of a public sale, where a good many people were attending; that on said occasion the deceased and one Burrell Messer, who was the father in law of ⁸⁷ the defendant, got into a quarrel, and were at the time near a crib a short distance from the dwelling-house, and that the defendant was not present at the commencement of the quarrel between Messer and deceased, but came upon the scene later, and while the two were still engaged in the altercation of words, and came from the direction of the dwelling-house. One Lovejoy was examined as a witness in behalf of the defendant, and testified that witness and defendant were standing near the dwelling-house, some distance from where deceased and Messer were, and were engaged in conversation relative to the settlement of a business matter between witness and the defendant; that from the place where witness and defendant were standing witness could not see Messer and deceased near the crib. The defendant offered to prove by this witness what he, the defendant, said when he started to where Messer was, near the crib, which was objected to by the state, and the objection was sustained. It was stated to the court what the witness would testify as to the declaration of the defendant when he started to where Messer and the deceased were near the crib, and where the defendant became involved in the difficulty resulting in the death of the deceased, which tended to show that the defendant started to where Messer was, for the purpose of getting some money changed with which to pay a debt to the witness. It is contended by counsel for defendant that his going to the scene of the altercation between his father in law, Messer, and the deceased, and after the quarrel between the two had begun, being shown in evidence, it was competent for him to show his declaration upon starting, as a part of the *res gestae* of his act in going to where Messer and the deceased were. We think this contention is sound. Whenever evidence of an act is in itself competent and admissible as a material fact in the case, and is so admitted, the declarations accompanying and characterizing such act become and form a part of the *res gestae* of the act, and as such, are competent and admissible in evidence as being explanatory of the act. The sincerity of such declarations, or what weight may be given to the same, is a question for the jury. The court erred in excluding ⁸⁸ this testimony: *Harris v. State*, 96 Ala. 24, 11 South. 255; *Tesney v. State*, 77 Ala. 33; *Martin v. State*, 77 Ala. 1; *Kilgore v. Stanley*, 90 Ala.

523, 8 South. 130; 1 Greenleaf on Evidence, sec. 108; 21 Am. & Eng. Ency. of Law, 1st ed., 99.

Other exceptions reserved to the rulings of the court on the admission and exclusion of evidence are without merit. Moreover, the same are not insisted on in argument.

There were a number of written charges requested by the defendant, the greater part of which were given by the court. Of the written charges refused those numbered 1, 4, 15, 23, and 25, only, are insisted on in argument. Charge 1 was properly refused as being argumentative. The remaining charges above mentioned are possessed of infirmities rendering them bad, and for which similar charges have been condemned in one or more of the following cases: *Gilmore v. State*, 126 Ala. 20, 28 South. 595; *Fountain v. State*, 98 Ala. 40, 13 South. 492; *Stone v. State*, 105 Ala. 60, 17 South. 114; *Roden v. State*, 97 Ala. 54, 12 South. 419; *Bondurant v. State*, 125 Ala. 31, 27 South. 775; *Compton v. State*, 110 Ala. 24, 20 South. 119. These charges, in postulating an acquittal upon self-defense, are either faulty, in that they are argumentative, or in the omission of some one of the constituent elements of self-defense.

The charges refused which are not insisted upon in argument need no comment on their defects.

For the error pointed out the judgment of the trial court will be reversed and the cause remanded.

Res Gestae are the Circumstances, facts, and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character. To make declarations a part of the *res gestae*, they must be contemporaneous with the main fact, though they need not be precisely concurrent in point of time: *Elder v. State*, 69 Ark. 648, 65 S. W. 938, 86 Am. St. Rep. 220, and cases cited in the cross-reference note thereto; monographic note to *People v. Vernon*, 95 Am. Dec. 51-76.

SMITH v. STATE.

[133 Ala. 145, 31 South. 806.]

LARCENY—Indictment.—The Ownership of Property Stolen from a Partnership is sufficiently laid in one of the members of the firm. (p. 22.)

LARCENY.—The Unexplained Possession of Property recently stolen does not, as a matter of law, raise a presumption of guilt. (p. 22.)

LARCENY.—The Unexplained Possession by one person of goods belonging to another does not raise a presumption that a larceny has been committed and that the possessor is a thief. (pp. 22, 23.)

LARCENY—Possession of Goods.—Until the Prosecution has shown a prima facie larceny, it is not entitled to introduce evidence of possession by the defendant of the goods alleged to have been stolen. (p. 23.)

LARCENY—Proof of Corpus Delicti.—If the evidence affords an inference of larceny, its sufficiency is for the jury, and it is their province to determine whether the corpus delicti has been proved. In such case, evidence of possession by the prisoner of goods of the same kind as those charged to have been stolen is competent. (p. 23.)

CRIMINAL LAW.—The Corpus Delicti must often be proved by circumstances. (p. 23.)

CRIMINAL LAW—Reasonable Doubt.—A Charge to the jury that "unless the evidence is such as to exclude to a moral certainty every hypothesis but that of the guilt of the defendant of the offense charged in the indictment, you should acquit him," is correctly refused. (p. 24.)

LARCENY—Admissibility of Evidence.—In a prosecution for larceny, evidence of the defendant's opportunity of aiding the owner's employé in committing the theft, or of his opportunity of receiving the goods from such employé is admissible. (p. 24.)

The appellant was convicted of larceny. The indictment charged larceny from the storehouse of one Garner, and that the goods stolen were his property. The evidence showed, however, that the goods belonged to the firm of Garner & Embry, of which firm Garner was a member, and that the building they occupied was not their property. The storehouse of Garner & Embry had a basement where some of the goods were stored, and one Thompson, an employé of the firm, had access to the basement, and sometimes went there alone. He could open the rear door or window of the basement leading to an alleyway. He was suspected of using the basement and the door or window in stealing the goods. The defendant worked as a porter in the store of Sullivan & Hart Drygoods Company, which joined the store of Garner & Embry. This store had a basement and

was situated similarly to Garner & Embry's store. The defendant worked in the basement, and carried a key to it. Other evidence was introduced to the effect that the goods, under the authority of a search-warrant, were taken from the house of the defendant, and that explanations of the possession of the goods by the defendant were made. The defendant requested the court to give these instructions, and excepted to the court's refusal to do so: 1. "If the jury believe the evidence, they must find the defendant not guilty"; 2. "Unless the evidence is such as to exclude to a moral certainty every hypothesis but that of the guilt of the defendant of the offense charged in the indictment, you should acquit him." An application for a new trial was overruled, to which the defendant excepted.

Paul Hodges, for the appellant.

Charles G. Brown, attorney general, for the state.

¹⁴⁹ TYSON, J. The ownership of the property is sufficiently laid in Garner, one of the members of the partnership: Code, sec. 4909; *White v. State*, 72 Ala. 195; *Brown v. State*, 79 Ala. 51.

¹⁵⁰ It must now be regarded as settled in this state that the unexplained possession of property recently stolen does not, as matter of law, raise a presumption of guilt from the circumstance. Nor does the unexplained possession by one person of goods belonging to another raise the presumption that a larceny has been committed and that the possessor is a thief. Additional evidence is necessary to establish a *corpus delicti*. Unless the jury are satisfied beyond a reasonable doubt that the offense has been committed, the unexplained recent possession of goods will not justify the conclusion that the person in whose possession they are found is the thief: *Orr v. State*, 107 Ala. 35, 18 South. 142; *Thomas v. State*, 109 Ala. 25, 19 South. 403. "Proof of a charge, in criminal causes, involves the proof of two distinct propositions: First, that the act itself was done; and, secondly, that it was done by the person charged, and by none other—in other words, proof of the *corpus delicti* and of the identity of the prisoner": *Winslow v. State*, 76 Ala. 47. It is undoubtedly true that both of these essential propositions are generally for the determination of the jury, and both must be proved beyond a reasonable doubt. But where there is no proof of the *corpus delicti*—no testimony tending in the remotest degree to prove that the property charged to have been stolen

was in fact stolen—no larceny shown to have been committed, then there can be no conviction of the prisoner, should the goods described in the indictment charged to have been stolen be found in his possession, though no explanation as to how he came by them be given by him, or if given, is entirely unsatisfactory. In such case the evidence is not *prima facie* sufficient to establish the *corpus delicti*, and the court should not allow the introduction of evidence of possession by the prisoner of the goods charged in the indictment to have been stolen. In other words, until the State has by positive or circumstantial evidence shown a *prima facie* larceny of the goods, which is for the determination of the court, solely for the purpose of determining the admissibility of evidence tending to connect the prisoner with the commission of the offense, the prosecution is not entitled to introduce evidence of ¹⁵¹ possession by defendant of the goods alleged to have been stolen. In this respect, the case would not be different from the one where an extrajudicial confession is sought to be introduced against one charged with a felony. Or where there is an entire want of evidence of the *corpus delicti* except statements made by the prisoner or unexplained possession of the goods alleged to have been stolen, the court should direct the jury to acquit the prisoner. On the other hand, if the evidence affords an inference of the larceny of the goods, then the question of its sufficiency is one for the jury, and it becomes their province to determine whether the *corpus delicti* has been proven. In such case, evidence of possession by the prisoner of goods of the same kind as those charged to have been stolen is competent, and the jury must determine upon the entire evidence, not only the question of the doing of the act, but whether committed by the defendant. Indeed, the *corpus delicti* must often be proved by circumstances. In the case at hand, the owners of the goods charged to have been stolen were wholesale merchants. Garner, one of the partners, swears that meat and lard had been stolen from their storehouse. It is true he could not state definitely when these articles of merchandise were taken, and neither could he identify the meat and lard found in the possession of the defendant as his firm's property, nor could he say that particular lard and meat had been stolen from his storehouse. But he was positive that meat and lard had been stolen prior to the institution of the prosecution against this defendant. On this evidence we are of the opinion that there was some proof tending to establish the *corpus delicti*, the weight and sufficiency of which was

properly left to the jury. Furthermore, we hold that it was sufficient to authorize the admission by the court of evidence of the possession by the defendant of meat and lard of the same kind as that which Garner said was stolen, and that the evidence of its identity was sufficient to be submitted to the jury when taken in connection with all the other evidence in the case: 78 Am. Dec. 258, note 6.

It follows from what we have said that the defendant was not entitled to have given the general affirmative charge requested by him.

¹⁵² The other written charge requested was correctly refused: *Bones v. State*, 117 Ala. 138, 23 South. 138.

In view of Thompson's access to the basement of the store in which the goods alleged to have been stolen were kept, and the fact that the windows and doors to this basement-room were unbroken, it was entirely competent for the state to prove that the defendant was a porter in the store of the Sullivan & Hart Drygoods Company, and that he had in his possession a key to the basement-room under that store which opened upon the same alley upon which the basement of the other store opened. Clearly, this testimony was relevant for the purpose of showing the defendant's opportunity of aiding Thompson in committing the larceny, or for the purpose of showing that he had the opportunity of receiving the goods from Thompson through an opened door or window, and concealing them in the basement to which he had a key until he could remove them.

The overruling of the motion for a new trial is not revisable. There is no error in the record, and the judgment of conviction must be affirmed.

The Recent Possession of Stolen Goods does not, as a matter of law, raise a presumption of guilt of larceny or burglary: See the monographic note to *Hunt v. Commonwealth*, 70 Am. Dec. 447-452; *Gravitt v. State*, 114 Ga. 841, 40 S. E. 1003, 88 Am. St. Rep. 63, and cases cited in the cross-reference note thereto.

The Corpus Delicti and the identity of the accused with the criminal act must be established in order to convict of crime. This may be done by circumstantial as well as by direct evidence: See *Willard v. State*, 27 Tex. App. 386, 11 Am. St. Rep. 197, 11 S. W. 453; *Campbell v. People*, 159 Ill. 9, 50 Am. St. Rep. 184, 42 N. E. 123; monographic note to *State v. Williams*, 78 Am. Dec. 252-259.

The Doctrine of Reasonable Doubt is considered in the monographic note to *Burt v. State*, 48 Am. St. Rep. 566-579; *State v. Cohen*, 108 Iowa, 208, 75 Am. St. Rep. 213, 78 N. W. 857; *State v. Sumner*, 55 S. C. 32, 74 Am. St. Rep. 707, 32 S. E. 771. A reasonable doubt is not a mere imaginary, captious, or possible doubt, but a fair doubt based upon reason and common sense. It is such a doubt as

will leave a juror's mind, after a careful examination of all the evidence, in such a condition that he cannot say that he has an abiding conviction, to a moral certainty, of the defendant's guilt: *State v. Williamson*, 22 Utah, 248, 83 Am. St. Rep. 780, 62 Pac. 1022. It is an actual, substantial doubt of guilt: *Ferguson v. State*, 52 Neb. 432, 66 Am. St. Rep. 512, 72 N. W. 590.

KELLY v. STATE.

[183 Ala. 195, 82 South. 56.]

BASTARDY PROCEEDING—Profert of Child.—In a bastardy proceeding it is competent to make profert of the child to the jury to show its likeness to the defendant. (p. 26.)

BASTARDY PROCEEDING—Association With Other Men.—In bastardy proceedings, if the state proves the defendant's association with the prosecutrix at about the date of conception, he may show that about the same time she associated with other men. (p. 27.)

Bastardy proceeding, in which Willis Kelly was found guilty of being the father of the bastard child of Florence Stone. For the purpose of showing the likeness of the child to the defendant, the state introduced the child in evidence, so that the jury could view it. The defendant, the child, and the mother were all white persons. The state introduced evidence that about the time the child was conceived, the defendant associated with the mother, having frequently been seen with her. To rebut this evidence, the defendant offered to show that during such time she was also seen in company of other men; and he proposed to prove by one Sellers and one Barr that they saw her at Alameda about sundown drinking cider with a young man other than the defendant; that Alameda is about two miles distant from her home; that she and the young man left Alameda alone, going in the direction of her home; that one of the witnesses drank some of the cider and it made him drunk; that the road from Alameda to her home leads mostly through the woods.

Lackland & Wilson, for the appellant.

Charles G. Brown, attorney general, for the state.

186 McCLELLAN, C. J. There is in *Paulk v. State*, 52 Ala. 427, this dictum: "On an issue formed in a bastardy 187

proceeding, it is doubtless competent for the defendant to prove that the child bears no likeness or resemblance to him, or that it resembles some other person, who had opportunities of illicit intercourse with the mother." It would necessarily follow that the prosecution upon such issue would be entitled to show that the child resembled the defendant; and, logically, that in such case it would be competent to make profert of the child before the jury to show its resemblance, or lack of resemblance to the putative father. In *Linton v. State*, 88 Ala. 216, 7 South. 261, the charge was miscegenation of the defendant Linton, a white woman, with John Blue, a negro; and of the propriety of allowing the prosecution to prove Blue's race by producing his person before the jury, this court said: "There was no error in allowing the state to make profert of the person of John Blue to the jury, in order that they might determine by inspection whether he was a negro, as charged in the indictment. There had been a severance in the trials of appellant and Blue; and evidence of this character is clearly competent to show sex (*White v. State*, 74 Ala. 31); age (*State v. Arnold*, 35 N. C. 184); personal resemblance (*State v. Woodruff*, 67 N. C. 89); color and race (*Garvin v. State*, 52 Miss. 207; *Gentry v. McMinnis*, 3 Dana (Ky.), 385), and many like facts in regard to the personality of the defendant himself, or of any other individual involved in the issue: Wharton's Criminal Evidence, sec. 311 et seq." The question in *Linton's* case, being one of race and not of resemblances, is not the question here; and that case is not authority here, but we have quoted from the opinion in that case to show our citation there with approval of the cases of *State v. Woodruff*, 67 N. C. 89, and *State v. Britt*, 78 N. C. 439, both of which were bastardy cases, and in one of which evidence of the child's resemblance to the defendant given by the midwife was received, and in the other it was held competent to make profert of the child to the jury to show its resemblance to the defendant. It is thus made to appear that in *Linton's* case, as well as in *Paulk's*, there is a dictum of this court to the effect that in bastardy proceedings profert may be made of the child. We shall hold in line with these dicta, and indorse the ruling ¹⁹⁸ of the circuit court in this connection. Much may be said as to the uncertainty of such evidence; and there are authorities against its competency as well as for it; but evidence should not be rejected merely on the ground that its bearing is not of a given degree of certainty, and while evidence of this sort may in point of fact often throw little light on the

issue, or none, it may, we think, be submitted for the jury's consideration as affording in most cases the basis for reasonable deductions on their part. The court committed no error in allowing proof of the child to the jury.

We are, however, of the opinion that the court erred in excluding the evidence offered by the defendant of the association of the prosecutrix with others, and particularly with another young man about the probable date of conception, and the circumstances of such association, the state having proved defendant's association with her about that time as affording an inference that he then had sexual intercourse with her. It seems clear to us that the proposed testimony of the witnesses Sellers and Barr, that covering the time of probable conception she was in the company of other men, and that on one occasion, nine months before the birth of the child she was in company of another man under circumstances affording opportunity for sexual intercourse, his attentions to her at that time, etc., was competent in rebuttal of the inference intended to be and naturally afforded by the evidence introduced by the state as to the association of defendant with her about that time.

For the rejection of this evidence the judgment must be reversed. The cause is remanded.

Evidence.—In *Bastardy Proceedings*, the child may be exhibited to the jury to show its resemblance to the defendant, if not of too immature age: See *State v. Saidell*, 70 N. H. 174, 46 Atl. 1083, 85 Am. St. Rep. 627, and cases cited in the cross-reference note thereto.

NOBLE v. GADSDEN LAND AND IMPROVEMENT CO.

[133 Ala. 250, 31 South. 856.]

CORPORATION—Distribution of Assets.—Minority Stockholders of a solvent corporation may maintain a bill for the distribution of its assets, when the enterprise for which it was organized has been abandoned and the original scheme is impossible of consummation. (p. 31.)

CORPORATION—Distribution of Assets—Parties.—A bill for the distribution of the assets of a corporation among the stockholders, which avers that the respondents are the principal shareholders and represent the adverse interest of all, that all the shareholders belong to the same class and have analogous interests, and that it would be impossible to bring the cause to a final hearing if all the stockholders are required to be made parties, is not demurrable because all the stockholders are not made parties. (p. 32.)

J. J. Willitt, for the appellants.

William H. Denson, for the respondents.

²⁵³ TYSON, J. The bill in this cause, after amendment, is the complaint of three stockholders owning in the aggregate two thousand eight hundred shares of the capital stock of the respondent corporation, and prays to have the corporation dissolved and its assets, which consist of six hundred acres of land, sold, and its proceeds distributed among the stockholders, for general relief, etc. The corporation is a private trading one, and has a capital of two million five hundred thousand dollars (\$2,500,000), divided into twenty-five thousand (25,000) shares of the par value of one hundred dollars (\$100) each. The purpose of its organization was the building of a town upon the tract of land owned by it. To this end this land was to be divided into lots, to be sold to those who could be induced to purchase them, and the company was to procure, if possible, the location of industrial enterprises on its lands, and thus enhance its value and make salable its lots. In short, it is what is known as a "boom concern." It was organized when the country was rife with speculation; and now that conservatism in financial matters has returned, after a severe experience during the years of financial depression, the company is left with this tract of land and nothing more, worth probably fifteen or twenty thousand dollars. Fortunately, it has no creditors, and, therefore, no one interested in its affairs, except its stockholders, who are shown to have abandoned the enterprise, leaving it to be managed by its board of directors as best they can. For five years its president and secretary have made diligent efforts to have the stockholders meet. Many of them are nonresidents of this state, and those who are residents decline to attend the meetings when called, after being notified and urged to do so. There are three hundred and forty-five of them, and the whereabouts of one-third of the ²⁵⁴ number is unknown and unascertainable, and the remaining two-thirds have lost all concern or interest in the affairs of the company. The fixed charges which the corporation is bound to meet annually, in the way of taxes, licenses, etc., is between six and seven hundred dollars. Its income annually is only about fifty dollars. So that each year a portion of its tract of land is sold by the state, county and city of Gadsden to pay these charges. It is wholly without credit and its assets are being sacrificed, the corporation, on

account of the abandonment of it by the holders of the majority of its stock, being powerless to prevent it.

It is upon substantially the foregoing state of facts, which is shown both by the averments of the bill and the testimony, that the complainants seek relief. On final hearing the chancellor dismissed the bill for want of equity, holding that, in the absence of a statute, the chancery court is without jurisdiction to dissolve the corporation and to distribute its assets at the suit of a minority stockholder.

Where the corporation is a going concern, it is undoubtedly true that a minority stockholder cannot maintain a bill to have it dissolved or to have its assets distributed. In such case, the shareholders who disapprove of the company's management or consider their speculation a bad one, their remedy is to elect new officers or to sell their shares and withdraw. "They cannot insist on having the company's business closed and the assets distributed, against the will of a single shareholder who wishes to have the business continued": 1 Morawetz on Corporations, sec. 283. But where the corporation has been abandoned by its stockholders, as here, and is, therefore, powerless to protect its assets and to discharge its duty to the stockholders as their trustee, minority stockholders who are cestuis que trust, if the chancery court has no jurisdiction to rescue the trust fund from the perils endangering its destruction, would be remediless. No efforts of theirs to have their trustee sell the lands and distribute its proceeds could avail them, for the obvious reason that it would require the consent of the holders of a majority of the stock to thus strip the corporation of its assets, which ²⁵⁵ is shown in this case cannot be obtained, not because of their unwillingness to give it, but on account of their lack of interest in the company. Clearly, its directors cannot do so, the corporation not being insolvent. They are merely the managing agents of the business of the corporation, to promote the ends designed by its charter, and do not possess such power or authority: *Elyton Land Co. v. Dowdell*, 113 Ala. 186, 59 Am. St. Rep. 105, 20 South. 981; 3 Thompson on Corporations, sec. 3983; 1 Morawetz on Corporations, sec. 513; 2 Cook on Corporations, 4th ed., sec. 670. These complainants desiring, as they do, to have this trust fund protected and administered so as they may get their part of it, have, in our opinion, under the facts of this case, the right to maintain this bill to have the lands sold and its proceeds distributed among the stockholders. On former appeal (*McKleroy v.*

Gadsden Land etc. Co., 126 Ala. 193, 28 South. 660), we said: "It is held in *Planters' Line v. Waganer*, 71 Ala. 581, that a private corporation, entered into solely for benefit of the shareholders, and involving no public duty, may be dissolved by the stockholders; and on the same principle, when the purpose of such an association is a failure, we quite agree with Mr. Thompson that there should be in the chancery court an inherent power to administer the property so as to restore to the cestuis que trust (the stockholders) their ultimate interest: 4 Thompson on Corporations secs. [4443, 4538], sec. 4545; *Fougeray v. Cord*, 50 N. J. Eq. 185, 24 Atl. 499; *Price v. Holcomb*, 89 Iowa, 123, 56 N. W. 407." In 1 Morawetz on Corporations, section 284, it is said: "Whenever, in the course of events, it proves impossible to attain the real objects for which a corporation was formed, or when the failure of the company has become inevitable, it is the duty of the company's agents to put an end to its operations and to wind up its affairs. Under these circumstances, the majority would have no right to continue to use the common property and credit for any purpose, because it would be impossible to use them for any purpose authorized by the charter. If the majority should attempt to continue the company's operations in violation of the charter, or should refuse to make a distribution of the assets, any shareholder feeling aggrieved would be entitled ²⁵⁶ to the assistance of the courts, and a decree should be made ordering the directors to wind up the company's business and distribute the assets among those who are equitably entitled": See, also, section 412 of same book.

In 2 Beach on Corporations, section 783, the author says: "Unless it appears beyond question that the continuation of a profitable business cannot be had, the dissolution of a corporation not yet insolvent will not be decreed upon petition of a minority of its shareholders. If, however, it is clear that the business cannot be profitably continued, the petition of a minority for a dissolution will be granted."

Spelling, in his work on Corporations, states the rule in substance to be, that the court would, in case the scheme was impossible, not allow the funds to be diverted to other purposes, but would enjoin such diversion at the suit of a stockholder, and as incidental give full relief by decreeing a settlement of the corporate liability and a distribution of the remainder among the stockholders.

In *Price v. Holcomb*, 89 Iowa, 123, 56 N. W. 407, the supreme court of Iowa, notwithstanding the provisions of a statute that "no corporation can be dissolved prior to the period fixed in the articles of incorporation, except by unanimous consent, unless a different rule has been adopted in their articles," held that "if a sale of the property was necessary the right to make it would not be defeated even if it had the effect of dissolving the corporation."

The case of *O'Connor v. Knoxville Hotel Assn.*, 93 Tenn. 708, 28 S. W. 309, in its facts is very similar to the one in hand. The bill was filed by a single stockholder against the corporation and other stockholders, in which the facts alleged showed an abandonment of the enterprise and the original scheme to be impossible of consummation, and prayed for a distribution of the assets of the company. It was insisted there, as here that the bill was without equity. The court after reviewing the authorities held the bill had equity, and that the complainant was entitled to relief on common-law grounds.

²⁵⁷ Other authorities might be quoted to sustain the right of the complainants to the exercise of the jurisdiction of the court to have the assets of the respondent corporation distributed: See, also, *Arents v. Blackwell's Durham Tobacco Co.*, 101 Fed. 345; *Cramer v. Bird*, L. R. 6 Eq. 143; *Baring v. Dix*, 1 Cox, 213; 1 *Perry on Trusts*, 5th ed., sec. 242, and note a.

While the authorities are not in accord as to the right of the courts, in a proper case, to dissolve the corporation, they are practically unanimous, so far as our research has extended, in sustaining the right of the complainants, under the facts of this case, to have the assets of the corporation distributed, which may be done under the orders and directions of the court through the agents of the corporation. And while the writer is inclined to the view that the court has the jurisdiction to dissolve the corporation, yet it is not necessary to go to that extent, as the rights of the complainants can be fully subserved by the court's administration of the trust estate through the agents of the corporation.

The other question, though not passed upon by the chancellor, but raised by demurrer, is that all the stockholders are not made parties to the bill. Of the total shares—twenty-five thousand (25,000)—of the capital stock, nine thousand eight hundred and ninety-nine (9,899) are owned and held

by the parties to this cause. Of this latter number, seven thousand and ninety-nine (7,099) shares are held and owned by the thirteen (13) respondents to the bill. As stated above, one-third of the stock is held by persons whose residences cannot be ascertained and who reside in all parts of this country. The respondents are, it is averred, the principal and largest stockholders, and fully and fairly represent the adverse interest of all the stockholders in the corporation; that all the stockholders belong to the same class, and their respective interests are analogous. It is also averred that it would be impossible to ever bring the cause to a final hearing if complainants are required to make all the stockholders parties; and such a requirement would result in inconvenience, oppressive delays and a consumption of ²⁵⁸ a large part of the assets of the company in court costs. It is clear to us that these averments bring the case under the operation of the provision of rule 19 of chancery practice: Code, p. 1205. In *Morton v. New Orleans etc. Assn.*, 79 Ala. 610, speaking to this point, the court said: "The rule is, that when the parties to a cause are numerous, or some of them are unknown or beyond the jurisdiction of the court, so as not to be subject to its process, but they all belong to a class whose rights are analogous to those of parties actually before the court, because dependent on the same principles of law, the court will often proceed to adjudge the rights of the class as such, and, in the absence of all collusion, the decree will be considered binding upon the whole class who are in a like situation. . . . This rule is fully recognized by rule No. 20 [now No. 19] of our chancery practise, which makes it discretionary with the chancellor, in such case, to dispense with bringing before him all the interested parties, and provides that the court may proceed in the cause without making such persons parties, provided it has sufficient parties before it to represent all the adverse interests of the plaintiff and the defendant in the suit. Nor is it repugnant to the concluding provision found in the same rule, declaring that 'the decree shall be without prejudice to the rights and claims of the absent parties.' . . . This, as we shall proceed to show, is the right to come in under the decree, and not antagonistic to what is properly settled by it": See, also, *State v. Webb*, 97 Ala. 111, 38 Am. St. Rep. 151, 13 South. 377; *Campbell v. Railroad Co.*, 1 Wood, 368, Fed. Cas. No. 2366.

The decree dismissing the bill for want of equity will be reversed and the cause remanded, with directions to the lower court to enter a decree ordering a sale of the land for distribution, and for such other orders or decrees as may be necessary to an equitable and orderly administration of the trust estate.

Reversed and remanded.

RIGHT OF A STOCKHOLDER TO MAINTAIN A BILL TO DISSOLVE THE CORPORATION AND DISTRIBUTE THE ASSETS.

The general rule is often laid down that a court of equity, in the absence of statutory authority, has no jurisdiction to dissolve a corporation and distribute its assets among the stockholders at the suit of one or more of them: *Coquard v. National Linseed Oil Co.*, 171 Ill. 480, 49 N. E. 563; *Stewart v. Pierce* (Iowa, Feb., 1902), 89 N. W. 234; *Oldham v. Mt. Sterling Imp. Co.*, 103 Ky. 529, 45 S. W. 779; *Mason v. Supreme Court of Equitable League*, 77 Md. 483, 39 Am. St. Rep. 433, 27 Atl. 171; *Denike v. New York etc. Cement Co.*, 80 N. Y. 599; *Strong v. McCagg*, 55 Wis. 624, 13 N. W. 895; *Taylor v. Decatur etc. Land Co.*, 112 Fed. 449; note to *State v. Atchison etc. R. R. Co.*, 8 Am. St. Rep. 200. The reason given for this rule is, that since the corporation owes its life to the sovereign power, its dissolution and the termination of its existence can be worked only by the state in a proper proceeding instituted in its behalf. There is much force to this reason in the case of quasi public corporations, and it may have had some validity as applied to all corporations at the time when valuable and exclusive franchises were granted by special legislative acts; but now, when corporations are organized under general laws, and the privilege of organization is open to all who comply with the requirements of the statute, it is entirely theoretical and without merit. Corporations established for objects quasi public, such as railway and telegraph companies, may well be within this rule; and so, also, may charitable and religious societies in the administration of whose affairs the community, or a part of the community, has an interest, in their corporate duties being properly discharged. Not so, however, with corporations of a private character, established solely for trading, manufacturing, or the like. Neither the public nor the legislature has any direct interest in their business or its management. These are committed to the stockholders, who have a pecuniary interest in the conduct of their affairs. They do not, by accepting a charter, undertake to carry on the business for which they are incorporated indefinitely, and without regard to the condition of the corporate property and affairs. Public policy does not require that they continue the existence of the concern at a loss.

On the contrary, it is clearly for the public welfare that the corporation should cease to exist as soon as it appears that it cannot prudently be continued.

There is no doubt of the right of a corporation, organized solely for private emolument and owing no duty directly to the public, by a vote of the majority of the stockholders, to dispose of its property, distribute its assets among the shareholders, and go out of business, when to do so is plainly for the best interest of all. The objections of the minority will be unavailing, provided the majority acts in good faith and the business can no longer be advantageously carried on. It would be a harsh and unreasonable rule that would permit one stockholder to hold the others to their investment when just cause exists for closing the corporate business: *Merchants' etc. Line v. Wagener*, 71 Ala. 581; *McKleroy v. Gadsden etc. Imp. Co.*, 126 Ala. 184, 193, 28 South. 666; *Price v. Holcomb*, 89 Iowa, 123, 56 N. W. 407; *Treadwell v. Salisbury Mfg. Co.*, 7 Gray, 393, 66 Am. Dec. 490; *Lauman v. Lebanon Valley R. R. Co.*, 80 Pa. St. 42, 72 Am. Dec. 685; *Wilson v. Proprietors of Central Bridge*, 9 R. I. 590; *Hayden v. Official etc. Directory Co.*, 42 Fed. 875.

Nor is this right confined to the majority. When it has become impossible to accomplish the chartered purposes of the corporation, or when its affairs have been so managed that failure or ruin is inevitable, it would be a reproach on the administration of justice if a court of equity, on the application of a stockholder or a minority of the stockholders, could not extend relief, and this without any express statutory authority. Of course, if stockholders disapprove of the company's management, which is conducted fairly and legitimately, their remedy is to elect new officers or sell their stock and withdraw. When the question is one of mere discretion in the management of the business or of doubtful event in the undertaking in which the concern has embarked, a remedy cannot be sought in a court of equity. On the other hand, if it plainly appears that the object for which the company was formed is impossible, it becomes the duty of the company's agents to put an end to its operations and wind up its affairs; and should they, though supported by a majority of the stockholders, pursue operations which must eventually be ruinous, or should the enterprise be abandoned as impossible of realization, any shareholder would, upon plain equitable principles, be entitled to the assistance of a court of equity, and a decree should be rendered compelling the directors to wind up the company's business and distribute its assets among those entitled to them: *Noble v. Gadsden etc. Imp. Co.* (principal case), ante, p. 27; *Ulmer v. Maine Real Estate Co.*, 93 Me. 324, 45 Atl. 40; *Benedict v. Columbus Construction Co.*, 49 N. J. Eq. 23, 23 Atl. 485; *O'Connor v. Knoxville Hotel Assn.*, 93 Tenn. 708, 28 S. W. 309; *Arents v. Blackwell's Durham Tobacco Co.*, 101 Fed. 338, 345; *Cramer v. Bird*, L. R. 6 Eq. 143.

This course is pursued in case of partnerships in similar situation, and "there is nothing in the character of a trading corporation to prevent the application of this remedy. It is, after all, as between the stockholders, nothing more than a trading copartnership. Chancellor Walworth says that 'joint stock corporations are mere partnerships, except in form; the directors are the trustees or managing partners, and the stockholders are the cestuis que trust, and have a joint interest in all the property and effects of the corporation,' and Hinman, C. J., says: 'Joint stock companies in modern times are nothing but commercial partnerships, which have taken the form of corporations for the greater facility of transacting business'": *Fongeray v. Cord*, 50 N. J. Eq. 185, 24 Atl. 499. "A case might occur," remarks Lord Cairns, "where the court would be willing to give, under the act, to a minority of shareholders the species of relief that sometimes is given in cases of ordinary partnership where it becomes impossible (I use the word 'impossible' in the strict sense of the term) to carry on the business any longer. . . . It is not necessary now to decide it; but if it were shown to the court that the whole substratum of the partnership, the whole business which the company was incorporated to carry on, has become impossible, I apprehend that the court might, either under the act of parliament, or on general principles, order the company to be wound up. But what I am prepared to hold is this: That this court, and the winding-up process of the court, cannot be used, and ought not to be used, as the means of evoking a judicial decision as to the probable success or nonsuccess of a company as a commercial speculation": *In re Suburban Hotel Co., L. R. 2 Ch. App. Cas. 737*.

While a court of equity may, at the suit of a stockholder, distribute the assets of the corporation among the shareholders and wind up the business, its power to extinguish the franchise or terminate the legal existence of the corporation is not so clear. Probably in most cases the rights of the complainant can fully be subserved without going to this length; yet, if the exigencies of any case demand such measures, we incline to the view of Mr. Justice Tyson, in the principal case, that a court of equity has jurisdiction to dissolve the corporation. The objection that the corporate franchise was granted by the state is purely technical, and should be no insuperable obstacle to relief if good cause is shown. Perhaps the question is of little practical importance anyhow, since when the corporation is stripped of its property and assets, its existence is virtually at an end.

BOSTICK v. JACOBS.

[133 Ala. 344, 32 South. 136.]

MORTGAGE FORECLOSURE—Application of Proceeds.—If a mortgage given to secure four notes, upon two of which is a surety, is foreclosed, the surety is entitled to have the proceeds applied in just proportion to that part of the debt for which he is bound. (p. 37.)

Bill by appellant Bostick against the appellees, averring substantially as follows: One Shoemaker purchased land from the defendants and executed to them his four promissory notes made payable at different dates. Bostick signed the two of these notes that would be first to become due. Shoemaker secured all four notes by executing a mortgage on the property. Upon default in the payment of the first two notes, the defendants sued Bostick as surety on them, and recovered judgment. Afterward, the defendants foreclosed the mortgage, and at the sale purchased the property. A short time after this they sold the property to one Smith. It was further averred that it was agreed by Bostick and Shoemaker on one side and the defendants on the other that the mortgage was primarily for the protection of Bostick as surety; that the mortgage executed did not give him the primary protection agreed upon; that such mortgage not only secured the first two notes, but also the entire indebtedness, and that it was stipulated therein, without the knowledge or consent of Bostick, that upon the failure to pay any of the notes the whole mortgage indebtedness should become due, and the mortgage should be foreclosed, and that in this respect the mortgage departed from the agreement; that Bostick was entitled to have the proceeds of the foreclosure applied for his benefit on the two notes upon which he was surety, in preference to the others; that the defendants received out of the proceeds a sum sufficient to liquidate such two notes; and that he was entitled to have them canceled and himself discharged from liability as surety. The defendants demurred to the bill and prayed for its dismissal. The court sustained the demurrer and motion, and the complainant appeals.

F. A. Bostick, for the appellant.

J. B. Tally and Martin & Bouldin, for the respondents.

³⁴⁶ TYSON, J. The bill in this cause presents two theories upon which the complainant relies to have the two notes which he executed as surety for the mortgagor ³⁴⁷ and upon which judgment was recovered against him, before the sale under the power contained in the mortgage was had, satisfied and discharged. The first of these proceeds upon the averment that the terms of the mortgage, to which he is not a party, are not in accordance with the understanding had with him by which he agreed to become bound as surety. This phase of the case, however, is not insisted upon in argument.

The other phase of the bill presents a case for equitable relief, not to the extent of having the entire proceeds derived from the sale under the mortgage applied to a release or satisfaction of the judgment, but only pro rata. By the terms of the mortgage, upon default in the payment of the first maturing note, upon which complainant was surety, the whole mortgage debt, including the other one upon which he was surety as well as the two notes executed by the mortgagor alone, became due and payable. In short, the default at maturity of the first maturing note matured the other three, thereby destroying all priority in the distribution of the proceeds of the sale of one note over another: 2 Jones on Mortgages, sec. 1703; also secs. 1179-1183.

Again the mortgage conferring no authority upon the mortgagees to apply the proceeds of the sale of the mortgaged property to the payment of any notes to the exclusion of the others, the law applied the proceeds to the entire debt secured by the mortgage. This being true, the complainant as surety has the right to have the proceeds of the sale (sixteen hundred dollars) applied in just proportion to the discharge of that portion of the debt for which he is bound: Fielder v. Varner, 45 Ala. 429; Orleans Co. Nat. Bank v. Moore, 112 N. Y. 543, 8 Am. St. Rep. 775, 20 N. E. 357; 2 Jones on Mortgages, 5th ed., sec. 1706.

It is scarcely necessary, in conclusion, to say that under no possible aspect of the case is the complainant, and for that matter can never become, entitled to have the proceeds of the sale to Smith by the respondents, as purchasers, applied to a discharge of his liability to them.

The decree of the court dismissing the bill for want ³⁴⁸ of equity is reversed, and a decree will be here rendered overruling the motion.

Reversed and rendered.

When a Creditor, Holding Several Notes against his debtor, with notice that one of them is signed by a surety, takes a mortgage from the debtor as security for all the notes, without any designation as to the application of proceeds of the security, he has a right to apply such proceeds in payment of the notes other than the one secured by the contract of suretyship, and greatly exceeding the value of the security: *Noble v. Murphy*, 91 Mich. 653, 30 Am. St. Rep. 507, 52 N. W. 148. But see *Grasser etc. Brew. Co. v. Rogers*, 112 Mich. 112, 67 Am. St. Rep. 389, 70 N. W. 445.

HICKS v. SWIFT CREEK MILL COMPANY.

[133 Ala. 411, 31 South. 947.]

EASEMENT AND LICENSE DISTINGUISHED.—An easement is a permanent interest in realty, while a license is a personal privilege to do certain acts upon the land of another without possessing any estate therein. (p. 39.)

EASEMENT AND LICENSE—How Created.—An easement must be created by deed or prescription, while a license may be by parol. (p. 39.)

A LICENSE is Generally Revocable at the will of the owner of the land in which it is enjoyed. (p. 39.)

LICENSE—Estoppel to Revoke.—One who gives verbal permission to construct a ditch and dam upon his land is not estopped to revoke the license, because the licensee incurs great expense in their construction. (pp. 40, 44.)

LICENSE—Revocation by Conveyance.—The conveyance of land upon which a third person has constructed a ditch and dam under a verbal permission from the land owner operates as a revocation of the license. (pp. 40, 44.)

LICENSEE—Damages Against.—The Grantee of land whereon a third person, by the verbal permission of the owner, had constructed a ditch and dam, may maintain trespass against the licensee for damages suffered, and the recovery may include exemplary damages. (p. 44.)

Gunter & Gunter, for the appellant.

Lomax, Crum & Weil, for the respondent.

418 **TYSON, J.** Practically but a single question is presented for our consideration and determination. It is whether the defendant, who is sued for a trespass upon the plaintiffs' lands, acquired an irrevocable license from the plaintiffs' grantor to use and maintain a ditch and dam for the purpose of floating logs. The facts, out of which this question arose, are undisputed and are these: One Smith, being the owner of the lands, in 1896 gave verbal permission to the defendant

to construct and operate the ditch and dam upon them, which was done by it at great cost. In August, 1899, the plaintiffs became the owners of the lands by deed upon which these structures were constructed, and went into possession of them, with full knowledge that the defendant was actively using and operating the ditch and dam, claiming the right to do so, under the permission given them by Smith.

Preliminary to a discussion of the question, it may not be amiss to say that, under these facts, no question of adverse possession can possibly arise. The entry by defendant being permissive, its possession was not adverse, but was in subordination of the rightful title: *Collins v. Johnson*, 57 Ala. 304; *Jesse French Piano Co. v. Forbes*, 129 Ala. 471, 87 Am. St. Rep. 71, 29 South. 683; 18 Am. & Eng. Ency. of Law, 2d ed., 1130.

It is not insisted by appellee that the permission granted to it created an easement. Clearly, such an insistence, if made, would be untenable, for the reason that it would have required a deed to have conveyed such a right. For "an easement must be an interest in or over the soil," and does not lie in livery, but in grant: *Washburn on Easements*, 6; 10 Am. & Eng. Ency. of Law, 2d ed., 409; *Jones on Easements*, sec. 80; *Brown on Statute of Frauds*, sec. 232. The difference between an easement and a license is, the former implies an interest in land, while the latter does not. An easement must be created, as we have said above, by deed or prescription, while a license may be by parol. The former is a permanent interest in the realty, while the latter is a personal privilege to do some act or series of acts upon the land of another without possessing any estate therein, and is generally revocable at the will of the owner of the land in which it is to be enjoyed: *Washburn on Easements*, 6; *Jones on Easements*, sec. 63. And when revocable, it is revoked by the death of the licensor, by his conveyance of the lands to another, or by whatever would deprive him of doing the acts in question or giving permission to others to do them: *Hodgkins v. Farrington*, 150 Mass. 19, 15 Am. St. Rep. 168, 22 N. E. 73; 18 Am. & Eng. Ency. of Law, 1141, note 10; *Jones on Easements*, sec. 73, note 4. Confessedly, the license to the defendant in this case was revoked by the conveyance of Smith, from whom it acquired it, unless he estopped himself to do so. And that it is insisted he did because the defendant has been at great cost in constructing the ditch and dam, being induced to do so under the permission

granted to it. It is further contended that the license has become an executed one, and, therefore, irrevocable. To use the language of Baron Parke: "It certainly strikes one as a strong proposition to say that a license can be irrevocable, unless it amounts to an interest in the land": *Williams v. Morris*, 8 Mees. & W. 488. To say nothing of so thin and gauzy attempt to evade the provision of the statute of frauds, requiring a sale of all interest in lands to be in writing except leases for a term not longer than one year; unless the purchase money, or a portion thereof, be paid and the purchaser be put in possession of the land by the seller: Code, sec. 2152, subd. 5. In other words, we are asked to hold, although the license to the defendant when granted was not intended by either party, to be anything more than a mere personal privilege to it, revocable by Smith at his will, and knowing, as it did, that under this license it acquired no interest whatever in the lands, that forsooth, with a knowledge of all these facts, ⁴²⁰ it acquired an indefeasible title to an easement over them because it expended money in constructing the ditch and dam. For it is too plain for argument that if Smith is estopped to revoke the license, all others who may acquire his title would be, and the defendant would enjoy a fee simple title to an easement, which had its origin in a mere license, and this too, without paying one cent of consideration therefor, to say nothing of so plain and palpable violation of the statute of frauds. Smith is not so much as shown, with or without consideration, to have made any promise that he would not exercise his privilege of revoking the license. And there is no pretense that he made any misrepresentation of any fact that induced the defendant to expend its money. The broad proposition is asserted that because he granted the license, knowing the purpose for which it was to be used, that he could never revoke it, because it would be a fraud to allow him to do so, and because it has become executed. We are aware that many courts hold this contention to be sound, but we cannot subscribe to it. Reason and the great weight of authority are against it. In Browne on the Statute of Frauds, section 31, it is said: "In some of the earlier decisions, both English and American, the licensee was protected against revocation, on the ground that the licensor was estopped to revoke a license on the faith of which the licensee had incurred expense; but is now well settled that the doctrine of estoppel does not apply, inasmuch as the licensee is bound to know that his license was revocable, and that in

incurring expense he acted on his own risk and peril. Courts of equity also have repeatedly declined to interfere on this ground": See, also, note 3 for cases cited to this.

In Jones on Easements, section 84, it is said: "An oral promise to grant an easement is not sufficient to raise an estoppel in favor of one who has acted upon it. In a case not relating to easements, Mr. Justice Gray states a principle which is applicable to this subject: 'A promise, upon which the statute of frauds declares that no action shall be maintained, cannot be made effectual by estoppel merely because it has been acted ⁴²¹ upon by the promisee and not performed by the promisor.'"

In 18 American and English Encyclopedia of Law, second edition, page 1146, it is said: "According to the prevailing view of the courts in England and a large number of the courts of the states of the United States, neither the execution of the license nor the incurring of expense, nor both combined, affect the right of the licensor, and he may revoke under all circumstances. It is held that the statute of frauds prevents any act other than the giving of a deed from vesting an irrevocable interest in land": See cases cited in note 7 in support of this proposition.

Mr. Freeman, in his note to Laurence v. Springer, 31 Am. St. Rep. 713 and 715, says: "A parol license is founded in personal confidence, and is defined to be an authority given to do some act, or a series of acts, on the land of another, without passing any interest in the land; . . . is a complete answer and defense to a claim of adverse possession set up by the licensee, . . . and not assignable. . . . At common law a parol license to be exercised upon the land of another, creating an interest in the land, is within the statute of frauds, and may be revoked by the licensor at any time, no matter whether or not the licensee has exercised acts under the license, or expended money in reliance thereon. In many of the states this rule prevails, while in others the licensor is deemed to be equitably estopped from revoking the license, after allowing the licensee to perform acts thereunder, or to make expenditures in reliance thereon. These two lines of cases cannot be reconciled; for one of them holds that an interest in land cannot be created by force of a mere parol license, whether executed or not, while the other declares that where the licensee has gone to expense, relying upon the license, the licensor may be estopped from revoking it, and thus an easement may be created. The

former line of cases, it seems to us, is founded upon the better reason. They decide that a parol license to do an act on the land of the licensor, while it justifies anything done by the licensee before revocation, is revocable, at the option of the licensor, and this, although ⁴²² the intention was to confer a continuing right, and money has been expended by the licensee upon the faith of the license. Such license cannot be changed into an equitable right on the ground of equitable estoppel."

Case after case might be cited to support the principles announced by these text-writers, but they are too numerous to do so here. They can be found by reference being had to the notes referred to in the text quoted. However, before examining the decisions of our own court, we will refer to the case of *Thoemke v. Fiedler*, 91 Wis. 386, 64 N. W. 1030, because of its striking analogy to the one in hand. We quote from a part of the opinion: "The oral agreement under which the ditch across the defendant's land was made did not create an easement in the land. An easement is a permanent interest in the lands of another, with a right to enjoy it fully and without obstruction. Such an interest cannot be created by parol. It can be created only by a deed or by prescription. But this agreement did not have the effect of a parol license. A license creates no estate in lands. It is a bare authority to do a certain act or series of acts upon the lands of another. It is a personal right and is not assignable. It is gone if the owner of the land who gives the license transfers his title to another, or if either party die. So long as a parol license remains executory, it may be revoked at pleasure. So an executed parol license, under which some estate or interest in the land would pass, is revocable. Otherwise, title would pass without a written conveyance, 'in the teeth of the statute of frauds.' Nor is such a license made irrevocable by the fact . . . that expenditures have been made on the faith of it. . . . Nor can the parol agreement be enforced in equity by way of specific performance."

We will now examine our own cases. In *Riddle v. Brown*, 20 Ala. 412, 56 Am. Dec. 202, it was held that the right "to dig and carry away iron ore" from the mine of another is an easement; and any contract for the sale of such right, to be binding, must be in writing. That a verbal contract conferring such a right, though not binding under the statute of frauds, will nevertheless operate ⁴²³ as a verbal license, and, while unrevoked, will protect the person to whom it was given from

trespass quare clausum fregit, for digging ore and vest in him the property in the ore that was actually dug under it; but that it is revocable, at the pleasure of the party by whom it was given, and was personal and not assignable.

In *Motes v. Bates*, 74 Ala. 378, it was said: "We find no evidence in the record tending to show that the plaintiff Bates had any claim of legal right to be upon this portion of the defendant's field. It is shown that the lessee agreed to use the public road; and his employes or subtenants had no greater rights than he had. If the plaintiff's alleged custom in using the pathway, for some time previous, could be construed into a permission by defendant to do so, this was, at best, only a parol license, which was revocable at the pleasure of the person giving it. Every license of this kind, by which one is permitted without consideration to pass over the lands of another, is essentially revocable in its very nature, its continuance depending upon the mere will of the person by whom it was created or granted": Citing approvingly *Riddle v. Brown*, 20 Ala. 412, 56 Am. Dec. 202.

In *Tillis v. Treadwell*, 117 Ala. 448, 22 South. 983, quoting from *Rudisill v. Cross*, 54 Ark. 519, 26 Am. St. Rep. 57, 16 S. W. 575, where it was held: "The obligations of a land owner to build and maintain a division fence, in whole or in part, for the benefit of adjoining land, is something more, indeed, than an obligation to furnish the materials and labor necessary from time to time for the erection and reparation of the fence; it imposes a burden upon the land itself. A partition fence ordinarily must rest equally upon the land of the respective proprietors. Hence, an agreement of one of those proprietors to maintain such a fence necessarily imports a dedication of the use of the land required to support half of it. To that extent it is, therefore, an estate in the land itself. In accordance, then, with the general rule that an easement, being an interest in realty, cannot be conveyed or reserved by parol, an agreement by an owner of land to maintain a partition fence between such land and that of an adjoining proprietor cannot ordinarily rest in parol, but to be ⁴²⁴ binding, must be in writing." Our court then proceeds: "A grant to an adjoining proprietor of the use of a wall on his own premises, as a partition wall between their buildings, is the grant of an easement, and a parol agreement to build and grant the use of such wall is within the statute. . . . Under our decisions parol agreements for the grant of easements are void under the statute:

Riddle v. Brown, 20 Ala. 412, 56 Am. Dec. 202; Hammond v. Winchester, 82 Ala. 470, 2 South. 892." See, also, the following cases in which Riddle v. Brown is cited approvingly: Heflin v. Bingham, 56 Ala. 575, 28 Am. Rep. 776; Chambers v. Alabama Iron Co., 67 Ala. 357; Louisville etc. R. R. Co. v. Boykin, 76 Ala. 564; Motes v. Bates, 80 Ala. 368; Hammond v. Winchester, 82 Ala. 477, 2 South. 892.

The right of a licensor to revoke a license given by him is fully recognized by our court, as will appear from a mere cursory examination of the cases cited above. And, indeed, is fully recognized in the case of Rhodes v. Otis, 33 Ala. 578, 73 Am. Dec. 439, upon which the defendant relies to support its contention of estoppel. Suffice it to say, that in that case a consideration was paid for the easement or license, and the licensee or transferee put into possession of the land and waterway over which the rights to him were agreed to be granted. There was, therefore, no question of the operation of the statute of frauds, and, indeed, could not be. This being true, upon the plainest principles of equity, the licensor or seller should not have been permitted to retain the purchase money paid to him, and to destroy the rights which he had sold to the other party. This is far from sustaining the doctrine contended for here.

In Clanton v. Scruggs, 95 Ala. 282, 10 South. 758, it is said: "The fact that one of the parties to such an agreement has acted on the faith of its validity does not raise up an estoppel against the other party to deny that it is binding on him. A mere breach of promise cannot constitute an estoppel in pais: Weaver v. Bell, 87 Ala. 385, 6 South. 298." Continuing, on page 283. (95 Ala., 10 South. 758), after quoting from Weaver v. Bell, that "a representation relating to future action or conduct operates as an estoppel only when it has reference to the future relinquishment or ⁴²⁵ subordination of an existing right, which it is made to induce, and by which the party to whom it was addressed was induced to act," the court said: "The representation there referred to does not include a mere promise to do or refrain from doing something in the future: . . . Brigham v. Hicks, 108 Mass. 246. Such a rule of estoppel would take the sting out of the statute of frauds, and defeat its manifest purpose." The case of Brigham v. Hicks, cited approvingly, is the one from which the quotation from Jones on Easements was taken.

It is clear that the decisions of this court are in harmony with the principles announced by us and with the text-writers from whom we have quoted at length. Smith, not being estopped, his conveyance of the land ipso facto was a revocation of the license to the defendant, and the plaintiffs having acquired the legal title to the land and to the ditch, were entitled to the immediate possession thereof, and have a right to maintain this action and to recover such damages as they may have suffered by reason of the trespass committed by defendant: *Davis v. Young*, 20 Ala. 151; *Boswell v. Carlisle*, 70 Ala. 244; *Dunlap v. Steele*, 80 Ala. 424; *Fields v. Williams*, 91 Ala. 502, 8 South. 808. And the jury may award exemplary damages if they see proper: *Wilkinson v. Searcy*, 76 Ala. 181; *Alley v. Daniel*, 75 Ala. 408. "Whatever is done," says Shaw, J., in *Wills v. Noyes*, 12 Pick. 324, "willfully and purposely, if it be at the same time wrong and unlawful and known to the party, is in legal contemplation malicious": *Lynd v. Pickett*, 82 Am. Dec. 89.

There is nothing in the facts which tends in the remotest degree to show that the plaintiffs ever renewed the license. On the contrary, they are shown to have asserted their rights, under the revocation by demanding the payment of rent of defendant.

It is scarcely necessary to say that no damages for the negligent maintenance or operation of the ditch or dam are sought to be recovered in the complaint, and, indeed, could not be under its averments.

Reversed and remanded.

The Nature and Revocation of Parol Licenses are considered in the note to *Laurence v. Springer*, 31 Am. St. Rep. 712-719. An oral license to maintain a ditch on the land of another is revocable, although money has been expended thereon by the licensee: *Hathaway v. Yakima Water etc. Co.*, 14 Wash. 469, 53 Am. St. Rep. 874, 44 Pac. 896; *Ewing v. Rhea*, 37 Or. 583, 82 Am. St. Rep. 783, 62 Pac. 790. Compare *Buck v. Foster*, 147 Ind. 530, 62 Am. St. Rep. 427, 46 N. E. 920; *Flickinger v. Shaw*, 87 Cal. 126, 22 Am. St. Rep. 234, 25 Pac. 268. A conveyance of the land in which a license is enjoyed acts as a revocation of the license: *Emerson v. Shores*, 95 Me. 237, 85 Am. St. Rep. 404, 49 Atl. 1051.

FIRST NATIONAL BANK v. TYSON.

[183 Ala. 459, 32 South. 144.]

NUISANCE.—A Municipal Corporation Cannot License the erection or the commission of a nuisance in or on a public street. (p. 48.)

NUISANCE—Building into Street.—Columns of a building projecting some two feet onto the sidewalk are a public nuisance. (p. 48.)

NUISANCE—Building into Street.—An Adjoining Owner, who sustains special damages, apart from those suffered by the general public, may sue to restrain the erection of columns of a building which will encroach upon the sidewalk. (p. 49.)

THE BASEMENT of Light and Air is placed along with the easement of access, the one no more important than the other, except in degree. (p. 49.)

EASEMENT OF VIEW from Street.—An adjoining owner may sue to restrain the erection of a building which, encroaching upon the public street, obstructs his easement of view. (p. 52.)

NUISANCE—Building into Street.—It is No Defense to a suit by an adjoining property owner to restrain the erection of a building encroaching upon the public street, that he has not applied without success to the public authorities for relief. (p. 52.)

DUPLICITY OF PLEA to Bill to Restrain Nuisance.—A plea to a bill by an adjoining property holder to restrain the erection of a building encroaching upon the public street is bad for duplicity, if it sets up that the complainant consented to the encroachment, and that he was not entitled to the light, air and view from that part of the street in front of the building. (p. 53.)

Bill by appellee Tyson against the First National Bank for a temporary injunction against the erection of a building. It was averred, in general, that the complainant owned a three-story building, used as a bank and office building, which extended up to the building line of the street, that the defendant was constructing a six-story building on the same side of the street on a lot immediately adjoining the complainant's building; and that the defendant intended to place in front of its building four columns, sixteen feet high and two feet, more or less, beyond the established building line into the street.

Answering the bill, the defendant by way of first plea averred that if the defendant's columns would encroach upon the street, then the complainant's building also encroaches on the street, and complainant is in pari delicto, and the special injury alleged to the complainant's light, air, and view will be done to that part of his building which is itself a public nuisance; but the defendant denies that the complainant is entitled to have light, air, and view across the lands in which the defend-

ant owns the fee, and over which the public only has an easement of passage.

By way of second plea, the defendant averred that it was its bona fide intention to conduct itself in a lawful manner in reference to the position and construction of its building, and, with that view, called upon the city authorities to point out and establish the true line between its property and the street; that the city failed and refused to point out the line, and thereupon the defendant, out of abundance of caution, applied to the city for, and the city granted, permission to project the base of its building twenty-six inches beyond the property line and to set up the columns twenty-two inches beyond such line; and that the sidewalk in front of the buildings is spacious, and the columns would not in any manner interfere with the rights of the public to convenient passage.

In a third plea the defendant averred that the complainant has estopped himself upon insisting upon special injury by consenting to the encroachment upon the street, and that the complainant is not entitled to have the light, air, and view come to his building from that part of the street in front of the defendant's building to which the defendant has the fee; and that the only easement to which the public or the complainant is entitled over that part of the street is the right of passage.

Watts, Troy & Caffey, for the appellant.

O. C. Maner, for the respondent.

473 HARALSON, J. The cause was submitted for decree on the pleadings, the exceptions of complainant to the three pleas filed by the defendant, the motions to discharge and dissolve the injunction, and on the demurrer to the bill, accompanied by the several affidavits filed by the complainant and defendant.

It may be stated broadly, since it seems to be everywhere settled in this country, that a building or other structure of like nature, erected on a street—which includes its sidewalks—without the sanction of the legislature, is a nuisance; that public “highways belong from side to side and from end to end to the public,” and they are entitled to a free passage along any portion of it, not in use by some other traveler, and there can be no rightful permanent use of the way for private purposes: Elliott on Roads and Streets, sec. 645. This court has

said: "The public have a right to passage over a street, to its utmost extent, unobstructed by any impediments, and any unauthorized obstruction which necessarily impedes the lawful use of a highway is a public nuisance at common law": *Costello v. State*, 108 Ala. 45, 18 South. 820. Again, it is said: "Any permanent obstruction to a public highway, such as would be caused by the erection of a fence or building thereon, is, of itself, a nuisance, though it should not operate as an actual obstacle to travel, or work a positive inconvenience to anyone. It is an encroachment upon a public right, and, as such, is not permitted to be done by the law, with impunity": *State v. Edens*, 85 N. C. 526.

It is again well settled that a municipal corporation cannot license the erection or commission of a nuisance in or on a public street. "A building," says Dillon, "or other structure of like nature, erected upon a street, without the sanction of the legislature, is a nuisance,"⁴⁷³ and the local corporate authorities of a place cannot give a valid permission thus to occupy streets, without express power to this end conferred on them by the charter or statute. The usual power to regulate and control streets has even been held not to authorize the municipal authorities to allow them to be encroached upon by the adjoining owner, by erections made for his exclusive use and advantage, such as porches extending into the streets, or flights of stairs leading from the ground to the upper stories of buildings, standing on the line of the streets. The person erecting or maintaining a nuisance upon a public street, alley or place is liable to the adjoining owner or other person who suffers special damages therefrom": 2 Dillon on Municipal Corporations, sec. 660, and authorities there cited; *State v. Mayor etc.*, 5 Port. 279, 30 Am. Dec. 564; *City of Demopolis v. Webb*, 87 Ala. 666, 6 South. 408; *Webb v. City of Demopolis*, 95 Ala. 116, 13 South. 289; *Hoole v. Attorney General*, 22 Ala. 194; *Costello v. State*, 108 Ala. 45, 18 South. 820; *Douglas v. City Council*, 118 Ala. 599, 24 South. 745.

There can be no question but that the erection of the proposed pillars by defendant in front of its building on the street, and which are to extend, as admitted, twenty-two inches beyond the west line of said building onto the sidewalk, is a public nuisance, to abate which the public might maintain a bill: *Reed v. Mayor etc.*, 92 Ala. 344, 9 South. 161; 1 Dillon on Municipal Corporations, sec. 374; *Elliott on Roads and Streets*, secs. 664, 665, authorities *supra*.

It is also well understood that, in addition to the right of the public to maintain a suit in equity for an injunction against the erection and maintenance of a public nuisance, a private citizen who sustains an injury therefrom, different in degree and kind from that suffered by the general public, may maintain a suit in equity to enjoin it: *Cabbell v. Williams*, 127 Ala. 320, 28 South. 405; *Mayor v. Rodgers*, 10 Ala. 37, 47; *Elliott on Roads and Streets*, sec. 665. As to the injury being irreparable, or not capable of full and complete compensation in damages, as is sometimes said to be the requirement in case a private citizen complains to abate it, Mr. Elliott observes in the section referred to that "the phrase 'irreparable injury' is apt to mislead. It does not necessarily mean, as used in the law of injunctions, that the injury is beyond ⁴⁷⁴ the possibilities of compensation in damages, nor that it must be very great. And the fact that no actual damages can be proved, so that in an action at law the jury could not award nominal damages only, often furnishes the very best reason why a court of equity should interfere in cases where the nuisance is a continuous one": *Ogletree v. McQuagga*, 67 Ala. 580, 42 Am. Rep. 112.

On the same subject Mr. Wood states, that "by irreparable injury is not meant such injury as is beyond possibility of repair, or beyond possibility of compensation in damages, nor necessarily great injury or great damage; but that species of injury, whether great or small, that ought not to be submitted to on the one hand, or inflicted on the other, and which, because it is so large on the one hand or small on the other, is of such constant and frequent occurrence that no fair or reasonable redress can be had therefor in a court of law": 2 Wood on Nuisances, sec. 778, and note; 3 Pomeroy's Equity Jurisprudence, sec. 1349; *Whaley v. Wilson*, 112 Ala. 630, 20 South. 922.

The bill alleges "that said encroachment [of the erection of said pillars on the sidewalk] upon said highway is a public nuisance, not only infringing upon the rights of the commonwealth of Alabama, but if same are completed and placed in position, as now contemplated by the First National Bank, said encroachment will greatly damage your orator beyond that which is common to the public generally, by injuring and depreciating the value of your orator's property, and by destroying the symmetry of your orator's building along the high-

way, which is valuable, and by obstructing the light, air and view necessarily ensuing therefrom, and by depreciating the rental value of your orator's property, in that the view of persons going south along the said highway north of your orator's building will be cut off from your orator's building." He also avers that the tenants in his building are valuable to him, and some of them have informed complainant that if said columns encroach on said highway, or if any part of said building of defendant encroaches on said highway, they will no longer remain his tenants. Here is averment of special damage to complainant apart from that which may be suffered by the public at large.

⁴⁷⁵ It appears that the bases of the columns proposed to be erected in front of defendant's building are outside of the west wall of the main structure to which they are expected to be attached, and, as is averred and not denied, "are to extend from the sidewalk, sixteen feet in height, more or less, and are to extend two feet more or less (twenty-two inches seems to be the real extent) beyond the established building line on said highway, into and upon the street." It is wholly immaterial, it may be added, whether these columns are designed to be for ornament or utility, or whether defendant will be prejudiced more by the temporary injunction against their erection than complainant might be, if it had not been granted.

We try the case on this appeal, on the pleadings as they are presented, in advance of any evidence taken in the cause. Whether the evidence when taken will, on submission of the case for final disposition, sustain the averments for relief or not, we are not given to know. It is a case as presented, as the court below held, and we think properly, where, everything considered, the complainant was entitled to his injunction, and its continuance, to await the final disposition of the cause: *Harrison v. Yerby*, 87 Ala. 185, 6 South. 3.

The defendant, it may be conceded, owns, as it claims, to the center of the street in front of its building, and its right to the use of its property in any way it pleases, subject only to the easement of the public along the street, as a thoroughfare of travel and commerce; but it denies to complainant the right to light, air and view, except from that part of the street immediately in front of his property. So far as light and air are concerned, the subject has been much discussed, and may be taken as well settled, but the question of view, if distinguishable from these, has not often arisen. The easement

of light and air is placed, on what would seem to be good reason, and certainly on authority, along with the easement of access, the one no more important than the other, except in degree. This easement of access, says Mr. Elliott, "is so far regarded as private property that not even the legislature can take it away and deprive the owner of it without compensation." ⁴⁷⁶ In New York and in most of the states in which the question has arisen, the abutter has an easement in the light and air over the street, and above the 'surface there can be no lawful obstruction to the access of light and air, to the detriment of the abutting owner.'" In support of the text, note 1, many authorities from different courts are cited, including the case of the New York Elevated R. R. Co. v. Fifth Nat. Bank, 135 U. S. 432, 10 Sup. Ct. Rep. 743. In the case last cited the court say: "The owners of lands abutting on a street in the city of New York have an easement of way and of light and air over it; and through a bill in equity for an injunction, may recover of the elevated railroad company full compensation for this easement; but in an action at law cannot, without the defendant's acquiescence, recover permanent damages, measured by the diminution in value of their property, but can recover such temporary damages only as they have sustained to the time of commencing action."

From the well-considered case of *Barnet v. Johnson*, 15 N. J. Eq. 481, we quote approvingly what we consider to be especially applicable to the case in hand: that there are "two classes of rights, originating in necessity and in the exigencies of human affairs, springing up coeval with every public highway, and which are recognized and enforced by the common law of all civilized nations. The first relates to the public passage; the second, subordinate to the first, but equally perfect and scarcely less important, relates to the adjoining owners. Among the latter is that of receiving from the public highway light and air. . . . When people build upon the public highway, do they inquire or care who owns the fee of the roadbed [or street]? Do they act or rely on any other consideration except that it is a public highway, and they the adjacent owners? Is not this a right of universal exercise and acknowledgment in all times and in all countries, a right of necessity, without which cities could not have been built, and without the enforcement of which they would soon become tenantless? It is a right essential to the very existence of dense communities. . . . It is a ⁴⁷⁷ right founded in such an urgent nec-

nessity that all laws and legal proceedings take it for granted. A right so strong that it protects itself, so urgent that, upon any attempt to annul or infringe it, it would set at defiance all legislative enactment and all judicial decision": *Dill v. Board of Education*, 47 N. J. Eq. 421, 20 Atl. 739; *Field v. Barling*, 149 Ill. 556, 41 Am. St. Rep. 311, 37 N. E. 850.

In the case of *Dill v. Board of Education*, 47 N. J. Eq. 421, 20 Atl. 739, touching the rights of parties to streets dedicated to public use, the court said: "If we inquire what those rights are, we find that they are twofold: 1. A right of access from the abutting property, and a passage to and fro over it in all its extent; and 2. A right of light, air, prospect and ventilation. These rights are quite distinct from each other, and capable of being separately exercised and enjoyed. The right of light, air and ventilation may be enjoyed fully without the least exercise of the right of access and passage. That this right of light, air, prospect and ventilation exists is clearly established by the authority of this and other states": *Hallock v. Scheyer*, 33 Hun, 111.

It is difficult to understand why an easement of view from every part of a public street is not, like light and air, a valuable right, of which the owner of a building on the street ought not to be deprived by an encroachment on the highway by a coterminous or adjacent proprietor. The right of view or prospect is one implied, like other rights, from the dedication of the street to public uses. As was well said by the learned judge below in respect to this right: "It seems to be a valuable right appurtenant to the ownership of land abutting on the highway, and to stand upon the same footing, as to reason, with the easement of motion, light and air, and to be inferior to them only in point of convenience or necessity, and that an interference with it is inconsistent with the public right acquired by dedication. The opportunity of attracting customers by a display of goods and signs is valuable, as I have no doubt the streets of any city in the world will demonstrate." As to these and all other matters brought forward, the injunction ⁴⁷⁸ should await the decision of the cause when tried for final decree, on pleadings and proof taken.

The demurrer on the ground that it is not alleged in the bill that complainant had applied without success to the authorities of the city of Montgomery for relief is wanting in merit. He had a right to file the bill without reference to any action taken by the city: *Douglass v. City Council of Mont-*

gomery, 118 Ala. 611, 24 South. 745. The demurrer as to any of its grounds was properly overruled.

From what has been said, it will appear that the first and second pleas were properly held to be without merit: See Louisville etc. R. R. Co. v. Mobile etc. R. R. Co., 124 Ala. 162, 26 South. 895; Webb v. City of Demopolis, 95 Ala. 116, 13 South. 289, respectively, as to each of these pleas. The court held that the third plea, as originally filed, was good; but, as amended, was bad for duplicity, citing Story on Equity Pleadings, 653. Without considering the third plea as originally filed, we concur with the court below that, as amended, it was bad for duplicity. There was no error in overruling the motion to discharge and dissolve the injunction, and, finding no reversible error in any of the rulings of the court below, let its decree be affirmed.

Tyson, J., not sitting.

An Abutting Lot Owner has a right to the unobstructed passage of light and air from the public street to his property, regardless of the ownership of the fee in the street: See the monographic note to Field v. Barling, 41 Am. St. Rep. 324; Willamette Iron Works v. Oregon Ry. etc. Co., 26 Or. 224, 46 Am. St. Rep. 620, 37 Pac. 1016. He is entitled to an injunction to prevent the erection of a private structure which will deprive him of such easement, notwithstanding the structure is authorized by an ordinance. A city cannot authorize a private individual, in his own interest, to obstruct the light and air from the street to the injury of abutting lot owners: Townsend v. Epstein, 93 Md. 537, 86 Am. St. Rep. 441, 49 Atl. 629.

An Encroachment on a Public Street is a nuisance: Yates v. Warrenton, 84 Va. 337, 10 Am. St. Rep. 860, 4 S. E. 818. And an individual has a right to enjoin a nuisance which causes him to suffer a special injury, different in kind and degree from that sustained by the public generally: Kauffman v. Stein, 138 Ind. 49, 46 Am. St. Rep. 368, 37 N. E. 333. But see State v. Stark, 63 Kan. 529, 88 Am. St. Rep. 251, 66 Pac. 243.

FRITH & COMPANY v. HOLLAN.

[133 Ala. 583, 32 South. 494.]

SALE—Implied Warranty.—On a sale of onion sets to a merchant by description, there is an implied warranty that they shall answer the description and be merchantable. (p. 55.)

SALE—Remedies of Buyer for Breach of Warranty.—A merchant, finding goods purchased by him to be in a bad condition, and part of them unmerchantable, may rescind the sale and return the goods, or retain them, and when sued for the price, avail himself of the damages suffered, either by bringing his cross-action for the breach of warranty, or by proving their real value and abating the recovery pro tanto. (p. 55.)

Assumpsit by appellant, Frith & Company, against Hollan for a balance alleged to be due upon the purchase price of onion sets which had been sold by the plaintiff to the defendant. There was evidence that when the onions were received, by the buyer they were badly sprouted, and damaged at least in the amount claimed by the plaintiff in the suit. There was also evidence that when the buyer received the onions, he put them in his store for sale, and to fill orders previously left with him.

The plaintiff requested the court to give the jury the following charges, which the court refused to do: 1. "If the jury believe the evidence they will find for the plaintiffs"; 2. "An implied warranty is not a guarantee that the article or thing sold is the best of its kind, or such as might have been represented at the time of sale, only that such article shall be reasonably suitable for the purpose for which it was intended to be used, and if the testimony shows that the defendant used said sets, they will find for the plaintiffs"; 3. "If the evidence shows that the onion sets delivered to defendant did not come up to warranty expressed or implied, the defendant must rescind by an offer to return the article in a reasonable time after discovery of the defects, and if he failed to rescind, you will find for the plaintiffs"; 4. "The defendant must act with promptness when he discovers that the property was not such as was contemplated and offer to return it. If he neglects to do so immediately upon discovering a breach of warranty or fraud and keeps it and treats it as his own, as by offering to sell it, he cannot reject the contract and is liable"; 5. "If the evidence shows that the defendant accepted the goods

by using them as his own by selling them, it is immaterial whether any of the goods were returned by the persons to whom Hollan had sold them, or whether he sold them at a reduced price or lost half." There was a judgment for the defendant. The plaintiffs appeal, assigning as error the refusal to give the charges requested.

Worthy & Gardner, for the appellant.

Foster, Samford & Carroll, for the respondent.

588 TYSON, J. This action was brought to recover the balance claimed to be due on the purchase price of onion sets sold by plaintiffs to defendant. The sale of the sets was at Troy, Alabama, to the defendant as a merchant and by description. When delivered they were in bad condition, much of them being unmerchantable. In such case there is an implied warranty that the sets delivered shall not only answer the description, but that they shall be salable or merchantable: *Gachet v. Warren*, 72 Ala. 292; 15 Am. & Eng. Ency. of Law, 2d ed., 1229. The defendant upon discovery of the condition of the sets had the right to rescind the sale within a reasonable time and return them; or retain them and avail himself of the damage he had suffered, either by bringing his cross-action for the breach of warranty, or to prove their real value and abate the recovery pro tanto: *Brown v. Freeman*, 79 Ala. 410; *Eagan v. Johnson*, 82 Ala. 233, 2 South. 302; *Young v. Arntze Bros.*, 86 Ala. 116, 5 South. 253; 15 Am. & Eng. Ency. of Law, 2d ed., 1255; *Benjamin on Sales*, Bennett's 7th ed., 965.

There is no evidence in the record tending in the remotest degree to support the theory that the sale counted on was by inspection and not by description. Under the evidence, it was a question for the jury to determine whether the price agreed to be paid by the defendant should be abated to the extent of the balance claimed by plaintiff against him.

It follows that the affirmative charge was properly refused to the plaintiffs. The other charges requested by them were at variance with the principles we have declared, and were correctly refused.

Affirmed.

A Sale of Goods by a particular description imports a warranty that they are of that description: *Northwestern Cordage Co. v. Rice*, 5 N. Dak. 432, 63 N. W. 298, 57 Am. St. Rep. 563, and cases cited in the cross-reference note thereto. But see *Waeber v. Talbot*, 167 N.

Y. 48, 82 Am. St. Rep. 712, 60 N. E. 288; *McCaa v. Elam Drug Co.*, 114 Ala. 74, 62 Am. St. Rep. 88, 21 South. 479; *Warren v. Buck*, 71 Vt. 44, 76 Am. St. Rep. 754, 42 Atl. 979. If goods sold by description do not correspond with the warranty, the vendee may either reject them, or receive them and rely on the warranty; and he may bring an action to recover damages for breach of the warranty, or set up a counterclaim for such damages in an action brought for the purchase price: *Northwestern Cordage Co. v. Rice*, 5 N. Dak. 432, 67 N. W. 298, 57 Am. St. Rep. 563, and cases cited in the cross-reference note thereto.

RUSSELL v. DAVIS.

[133 Ala. 647, 31 South. 514.]

FRAUDULENT CONVEYANCE.—The Burden of Proof is upon the grantee in a conveyance, assailed by a creditor as fraudulent, to show the bona fides of the transaction. (p. 59.)

FRAUDULENT CONVEYANCE—Relatives.—The fact that a transaction, assailed by creditors as fraudulent, was between parties nearly related, is a circumstance calling for closer scrutiny than if the parties were strangers. (pp. 59, 60.)

FRAUDULENT CONVEYANCES.—Although Conveyances are Separate, and executed at different times, if done in pursuance of a common design to defraud, any fact that vitiates one will be visited upon all. (p. 60.)

FRAUDULENT CONVEYANCE.—If a Debtor Prefers one of his creditors by conveying his entire estate to him, the conveyance is void as to other creditors, if the transfer is not absolute, without benefit reserved, if the property is in excess of the demand, if the debt is fictitious in whole or in part, or if any cash consideration is given. (p. 60.)

Humes, Sheffey & Speake and W. R. Francis, for the appellants.

McClellan & McClellan and J. H. Turrentine, for the respondent.

652 DOWDELL, J. The present bill is that of a creditor against an insolvent debtor and for the purpose of setting aside certain conveyances made by the debtor as being fraudulent as to creditors, and in this connection to have an accounting by the debtor, E. J. Russell, with the complainant as the administrator of the estate of Eliza Lane, deceased. The equity of the bill was determined by this court on a former appeal from the decree of the chancellor overruling the demurrer to the bill: *Russell v. Garrett*, 75 Ala. 348. The present appeal is taken from a final decree on a submission of the cause

upon the pleadings and evidence. In this decree the chancellor, without passing upon the numerous objections and exceptions to testimony on both sides, and after considering only the competent and legal evidence, as stated in his decree, determined that the complainant was entitled to the relief prayed for in the bill. By the decree the following facts also were specially ascertained from the evidence, viz.: That the respondent, E. J. Russell, was indebted to Eliza Lane at and before the time of the alleged fraudulent transfers, and to the complainant as the administrator of her estate, at the time of the filing of the bill; and that the transfers and conveyances made by the debtor from the first day of January to the seventh day of February, 1882, as alleged in the bill were fraudulent and void as to creditors, and also that the said E. J. Russell was insolvent at the time of the said alleged transfers and conveyances of his property. The decree then directed ~~as~~ a reference to the register to ascertain the amount of the complainant's debt, and also the description and value of the property so transferred and conveyed, which the decree condemned for the satisfaction of said indebtedness.

The assignments of error go to the chancellor's conclusions as to the facts from the evidence.

The principles of law applicable to the present case are plain and practically free from difficulty; indeed, there is little or no controversy as to the law governing the main issues in the case. The testimony taken in the case is voluminous, covering over a thousand pages of the transcript. The objections and exceptions to evidence on both sides are numerous, and much of the same is subject to objection for being either illegal, incompetent, or irrelevant. We concur with the chancellor in the suggestion as to the time it would take to enter upon a discussion of the objections to the evidence; besides, it would extend this opinion into many pages without subserving any beneficial end. We have given the whole of this testimony a careful reading, and after eliminating the illegal and considering that which is legal, will, in dealing with the questions involved, undertake only to state our conclusions as to the facts drawn from the evidence.

The first question of fact presented for consideration is that of indebtedness from the respondent, E. J. Russell, to the complainant, as administrator of the estate of Eliza Lane, deceased. The chancellor in his decree determined from the evidence the existence of an indebtedness, without ascertain-

ing the amount, but referred the question of amount to the register. The appellants assign this finding of fact by the chancellor as error, insisting that on the evidence the respondent, E. J. Russell, was and is a creditor of said estate, and not a debtor. On this question of indebtedness the burden of proof was on the complainant. It is a conceded fact that the said E. J. Russell was the agent of the said Eliza Lane from some time in the early spring of 1881 until her death, on May 16, 1882, in letting out and collecting the rent on several plantations in the county ⁶⁵⁴ of Limestone, and looking after the repairs on said plantations, and also in advancing supplies to tenants on the plantations enabling them to grow crops on the same, on the credit and responsibility of Mrs. Lane, the said agent being at the time engaged in the business of a merchant in the town of Athens, and realizing the profits on such advances. The said E. J. Russell offered in evidence a statement of his account as such agent, with credits and debits, showing a balance in his favor of something over six hundred dollars. Without attempting to ascertain or show the amount of the said Russell's indebtedness, a matter to be hereafter determined under the decree of reference, we need only to advert to one item contained in said account and the evidence relating thereto to satisfy us of the correctness of the chancellor's finding of the fact of said Russell's indebtedness to said estate. In this account he credits himself with the sum of two thousand dollars for his services rendered as such agent. There is no pretense of any contract or agreement between him and his principal of any stipulated sum for his services. He simply claims the same as reasonable compensation for services rendered and offered evidence to that end. The great weight of the evidence, we think, satisfactorily and clearly shows that for the services actually rendered the claim was excessive, and that a fair and reasonable compensation would not exceed three hundred dollars. The amount of the income in the way of rents from these plantations being about two thousand five hundred dollars, a charge of two thousand dollars for services rendered, which consisted in the main of letting out the lands and collecting the rents and visiting the plantations three or four times during the year, is as shown by the evidence palpably an inequitable division of the proceeds by the agent with his principal. With this item of his account scaled to what would be fair and reasonable compensation for his services as agent, as shown by the great weight of the evidence,

the fact of his indebtedness to the complainant is put beyond doubt. But, in addition to this, there is the testimony of several disinterested witnesses to his ⁶⁵⁵ admission of an indebtedness to the estate of Mrs. Lane, made by him in conversation with these witnesses at different times soon after the death of Mrs. Lane.

The next assignment of error in the decree, like the first, relates to the finding of a fact, viz., fraud in the transfers and conveyances of his property by the said E. J. Russell to his several brothers from the 1st of January up to and including the seventh day of February, following. The making of the several transfers and conveyances to his brothers by the said respondent, E. J., assailed by the bill is not denied, but it is claimed by the respondents that these conveyances and transfers of his property were made in good faith and in payment of a pre-existing indebtedness of the said E. J., to each of the several grantees. The existence of a debt to the complaining creditor being shown, the conveyances by the debtor being admitted, the burden of proof is upon the grantees in the conveyances assailed as fraudulent, to show the bona fides of the transactions. This proposition of law is too familiar to require elaboration in argument, and as for authorities we content ourselves by referring to those cited in brief of appellee's counsel.

That the respondent, E. J. Russell, was insolvent during the period of time from January 1 to February 7, 1882, covering the conveyances attacked by the bill and held fraudulent by the chancellor, we think the evidence clearly establishes. Counsel for appellant concede in argument that during this time he was being harassed by some of his creditors and was financially embarrassed. The grantees in the alleged fraudulent conveyances were the brothers of the grantor, the embarrassed and failing debtor, and that they knew of his insolvency, we think, under the evidence, is beyond doubt. They were intimate as brothers, and had frequent interviews and consultations during the time covering the making of the alleged fraudulent transfers. Two of the brothers were at the time in the employment of the grantor, and another had his office in the store where the grantor carried on his merchandise business. In determining the bona fides of a transaction ⁶⁵⁶ assailed as fraudulent, the fact that such transaction was had between parties nearly related is a circumstance which naturally calls for closer scrutiny than where the transaction is between

strangers. In the present case the transfers of his property by the said E. J. Russell to his several brothers, when taken in the aggregate, amounted to about ten thousand dollars, and, outside of his exemptions, embracing substantially all of his visible tangible assets. That it was the purpose of E. J. Russell in making these transfers of his property to hinder, delay, and defeat other creditors in the collection of their debts, we think the evidence establishes beyond question, and our conclusion from the evidence is, that his brothers, the grantees, shared in this purpose. The evidence, in our opinion, warranted the conclusion reached by the chancellor of the existence of a common purpose on the part of the debtor and the grantees respondents in the bill, to defeat the creditors of the said E. J. Russell, and such being the case, the several conveyances, which were made in the months of January and February, 1882, though separate as to the several grantees and made at different times will be regarded and treated as a single transaction. And although the conveyances are separate, and executed on different dates, if done in pursuance of a purpose common to the grantor and the grantees to defraud, any fact that would vitiate any one of said conveyances as fraudulent would be visited upon all. Throughout these transactions from the 1st of January to the 7th of February, on which latter date the last of his visible assets, consisting of his stock of merchandise in his Athens store, was conveyed in bulk, the evidence discloses many circumstances denominated in the books as badges of fraud. But it is insisted that these transfers of his property by the debtor to the respective brothers were made in satisfaction and payment of antecedent bona fide debts due and owing by him to the said grantees, and for that reason the conveyances should be upheld regardless of the intent or motive. At the time of the making of these conveyances, which was prior to the enactment of the present statute ⁶⁵⁷ (Code 1896, sec. 2158), a debtor, though in failing circumstances or insolvent, had the right to prefer one or more of his creditors over others to the extent of conveying his entire estate, and to the end of defeating such other creditors in the collection of their debts. But even then, to support such conveyance, the same must have been absolute, and without reservation of any benefit to the grantor; the debt or demand a bona fide pre-existing debt; the property conveyed, on a fair and reasonable valuation, not unreasonably excessive of the demand. On the other hand, if the conveyance was not absolute, or benefit

reserved, or if the property conveyed was materially in excess of the demand, or if the debt was simulated or fictitious in whole or in part, or if the purchasing creditor gave in part any cash consideration in obtaining the conveyance, it rendered the same void as to other creditors. When tested by these principles, the burden resting upon the respondents to show by clear and satisfactory proof the bona fides of the transactions assailed, we are unable from all of the evidence to say that the burden has been discharged. As to the question of indebtedness to the respective grantees, in support of the testimony of the grantor and each of the grantees as to his particular debt, the books of the debtor grantor were offered in evidence to show the amount and that the debt was an antecedent debt. The entries in the debtor's books relative to the indebtedness showed very suspicious irregularities as to debts and in the order in which they were made, and also contained evidence of a number of erasures. This evidence tended very materially to weaken the testimony of the grantor and the grantees as to the bona fide existence of the alleged indebtedness. There is also other evidence which throws suspicion on the alleged claims of one or more of the grantees. There is likewise evidence which shows a reservation to the grantor in the transfer of some of his assets, or a pretended and not an absolute transfer. The evidence shows the grantor, subsequent to the alleged transfers, in the possession of choses in action trying to collect the same. There is also evidence going to show during ⁶⁵⁸ the time covering the transactions assailed in the bill transfer and sale by the debtor to one of the grantees of choses in action for a present cash consideration. Besides the circumstances adverted to above, there are others shown in the evidence relative to the actions, conduct, and statements by the said E. J. Russell and his said brothers, which, taken in connection with what we have mentioned, go not only strongly to show a common design on the part of the grantor and grantees to defeat other creditors in the collection of their debts, but also to impeach the bona fides of the alleged indebtedness of the grantor to the several grantees. To say the least of it, the evidence of the respondents, in face of so many suspicious circumstances disclosed, falls short of that clear and satisfactory proof required under the law and necessary to satisfy a court of equity of that good faith in the transaction between persons so intimately and nearly related when assailed for a fraud. On account of the number of witnesses examined, the wide range

taken in the testimony, and the voluminousness of the evidence, we have felt justified in this opinion in referring to it in a general way. And our conclusion from the whole evidence is, that the decree of the chancellor is free from error, and is here affirmed.

McClellan, C. J., not sitting.

A Debtor in Failing Circumstances May Prefer one creditor to the exclusion of others: *Shibler v. Hartley*, 201 Pa. St. 286, 50 Atl. 950, 88 Am. St. Rep. 811, and cases cited in the cross-reference note thereto. To impeach the transaction, there must be evidence of some benefit to the debtor beyond the discharge of his obligation, or some injury to the creditor beyond the payment of his debt, or some injury to other creditors beyond mere postponement of the debt preferred: *Snayberger v. Fahl*, 195 Pa. St. 336, 78 Am. St. Rep. 818, 45 Atl. 1065.

In an Attack upon a Fraudulent Conveyance, the burden of proof to establish the validity of the transaction is generally upon the defendant: See *Wooten v. Steele*, 109 Ala. 563, 55 Am. St. Rep. 947, 19 South. 972; *Bank of Colfax v. Richardson*, 34 Or. 518, 75 Am. St. Rep. 664, 54 Pac. 359; *Cottingham v. Greely-Barnham Grocery Co.*, 129 Ala. 200, 87 Am. St. Rep. 58, 30 South. 560; *Ames v. Dorroh*, 76 Miss. 187, 71 Am. St. Rep. 522, 23 South. 768. But see *Sabin v. Columbia Fuel Co.*, 25 Or. 15, 42 Am. St. Rep. 756, 34 Pac. 692; *Butler v. Thompson*, 45 W. Va. 660, 72 Am. St. Rep. 838, 31 S. E. 960. When the parties to the conveyance are relatives, they are held to a stricter proof of its bona fides than if they were strangers: *Butler v. Thompson*, 45 W. Va. 660, 72 Am. St. Rep. 838, 31 S. E. 960. But fraud will not be imputed to the parties because of the relationship alone: *Conry v. Benedict*, 108 Iowa, 664, 75 Am. St. Rep. 282, 76 N. W. 846.

CASES
IN THE
SUPREME COURT
OF
ARKANSAS.

EX PARTE FOOTE.

[70 Ark. 12, 65 S. W. 706.]

NUISANCES—Power of Municipal Corporations to Declare What are.—Under a statute authorizing municipal corporations to prevent annoyances within their limits from anything dangerous, offensive, or unhealthy, and to cause nuisances to be abated, they have power to prevent and abate nuisances, but not to declare anything to be a nuisance which is not so in fact. (p. 65.)

NUISANCES.—A Loud, Disagreeable Noise may create a nuisance, and be the subject of an action at law for damages, or a suit in equity for an injunction, or of an indictment as a public offense. (p. 66.)

NUISANCES.—The Keeping of a Jackass Within the Limits of a Municipal Corporation may by it be declared to be a nuisance, and punishable as such. (p. 67.)

HABEAS CORPUS.—Under This Writ Nothing Will be Inquired into if the Prosecutor is in Custody Under Process, except the validity of the process on its face and the jurisdiction of the court issuing it. (p. 67.)

J. L. Patterson, for the petitioner.

J. Emmett Smith and George W. Williams, for the town of Wynne.

¹³ **BATTLE, J.** W. R. Foote was accused and convicted in the mayor's court of the town of Wynne, in this state, of a violation of section 2 of the following ordinance:

"Be it ordained by the town council of the incorporated town of Wynne, Arkansas:

"Section 1. It shall be unlawful for any person to stand any stallion or jackass, for the purpose of foaling mares, within the limits of the incorporated town of Wynne.

"Sec. 2. The keeping of any jackass within the limits of said town, in the hearing distance of the populace of said town, is hereby declared a nuisance, and is hereby made unlawful.

"Sec. 3. Any person violating the provisions of sections 1 and 2 of this ordinance shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than ten nor more than twenty-five dollars, and each day that the provisions of either sections 1 or 2 are violated shall constitute a separate offense.

"Sec. 4. All ordinances in conflict with this ordinance are hereby repealed, and this ordinance shall be in force and take effect from and after its passage and publication. Approved May 9, 1901."

The court adjudged that he pay a fine of ten dollars and the costs of the prosecution, and, failing to do so, the marshal of the town took him into custody. He thereupon applied to the Honorable E. D. Robertson, chancellor of the fifth chancery district of Arkansas, for a writ of habeas corpus, alleging in his petition that his detention and restraint by the marshal were unlawful and wrong for the following reasons: "1. That the passage of said sections 2 and 3 of the ordinance aforesaid was *ultra vires*; 2. That said sections 2 and 3 of the said ordinance are null and void, and same are of no effect; 3. That said sections 2 and 3 of said ordinance being *ultra vires*, invalid, null and void, the said mayor has no jurisdiction to render the judgment aforesaid."

The marshal responded by admitting that he held the petitioner ¹⁴ in custody as alleged. Upon a hearing, no evidence being adduced, the chancellor denied the prayer of the petition. Was the ordinance void?

The statutes of this state invest municipal corporations with the "power to prevent injury or annoyance within the limits of the corporation from anything dangerous, offensive or unhealthy, and to cause any nuisance to be abated within the jurisdiction given to the board of health"—that is to say, within the corporate limits and one mile beyond; and to make and publish such by-laws or ordinances as to them shall seem necessary to carry into effect this power, and as may be "necessary to provide for the safety, preserve the health, promote the prosperity and improve the morals, order, comfort and convenience of such corporations and the inhabitants thereof": Sandel & Hill's Digest, secs. 5132, 5145, 5147.

These statutes endow municipal corporations with power to prevent and abate nuisances, but they do not authorize the declaration of anything to be a nuisance which is not so in fact: *Town of Arkadelphia v. Clark*, 52 Ark. 23, 20 Am. St. Rep. 154, 11 S. W. 957; *Yates v. Milwaukee*, 10 Wall. 497; 1 *Dillon on Municipal Corporations*, 4th ed., secs. 374, 379.

"The authority to prevent and abate nuisances," says Judge Dillon, "is a sufficient foundation for ordinances to suppress and prohibit whatever is intrinsically and inevitably a nuisance. The authority to declare what is a nuisance is somewhat broader; but neither this nor the general authority mentioned in the last preceding sentence will justify the declaring of acts, avocations, or structures not injurious to health or property to be nuisances. Much must necessarily be left to the discretion of the municipal authorities, and their acts will not be judicially interfered with unless they are manifestly unreasonable and oppressive, or unwarrantably invade private rights, or clearly transcend the powers granted to them; in which case the contemplated action may be prevented or the injuries caused redressed by appropriate suit or proceedings": 1 *Dillon on Municipal Corporations*, 4th ed., sec. 379. Again he says: "This authority [the power to prevent and abate nuisances] and its summary exercise may be constitutionally conferred on the incorporated place, and it authorizes its council to act against that which comes within the legal notion of a nuisance; but such power, conferred in general terms, cannot be taken to authorize the extrajudicial condemnation and destruction of that as a nuisance which in its nature, situation, or use is not such": 1 *Dillon on Municipal Corporations*, 4th ed., sec. 374.

¹⁵ In *Wood on Nuisances* it is said: "A nuisance, in the ordinary sense in which the word is used, is anything that produces an annoyance anything that disturbs one or is offensive; but in legal phraseology it is applied to that class of wrongs that arise from the unreasonable, unwarrantable or unlawful use by a person of his own property, real or personal, or from his own improper, indecent or unlawful personal conduct working an obstruction of, or injury to, a right of another or of the public, and producing such material annoyance, inconvenience, discomfort or hurt that the law will presume a consequent damage": 1 *Wood on Nuisances*, 3d ed., sec. 1.

The same author says: "Nuisances are either public or private. Public nuisances, strictly, are such as result from the violation of public rights, and producing no special injury to one

more than another of the people, may be said to have a common effect, and to produce a common damage. Of this class are those intangible injuries that result from the immoral, indecent and unlawful acts of parties that become nuisances by reason of their deleterious influences upon the morals or well-being of society": 1 Wood on Nuisances, 3d ed., sec. 14.

There are two kinds of public nuisances. One is that class of aggravated wrongs or injuries which affect the "morality of mankind, and are in derogation of public morals and decency," and, being *malum in se*, are nuisances irrespective of their location and results. The other is that class of acts, exercise of occupations or trades, and use of property which become nuisances by reason of their location or surroundings. To constitute a nuisance in the latter class, the act or thing complained of must be in a public place, or so extensive in its consequences as to have a common effect upon many, as distinguished from a few. Where it is in a city or town, where many are congregated and have a right to be, and produces material annoyance, inconvenience, discomfort, or injury to the residents in the vicinity, it is a public nuisance of the latter class.

It is said in Wood on Nuisances: "Many kinds of business that would be regarded as a nuisance upon a street that is densely populated and much traveled, or that is occupied for business purposes of such a character as naturally make it what is called a thoroughfare, would not be such upon a less populous street, or one that is not so much used by the public. . . . Thus, a blacksmith-shop would not for a moment be tolerated upon a principal street of a city in the vicinity of costly buildings and fashionable ¹⁶ business places, except it were kept up and maintained in a way so as to produce no possible annoyance or injury; but, from the needfulness of the business, it is tolerated upon streets in less important parts of the city, and the smoke and cinders arising therefrom, as well as the noisy reverberations from the heavy strokes of the sledgehammers on its numerous anvils in the prosecution of the business, is permitted, even without the aid of special ordinances": 1 Wood on Nuisances, sec. 21.

It is now well settled that "loud, disagreeable noise alone, unaccompanied with smoke, noxious vapors or noisome smells, may create a nuisance, and be the subject of an action at law for damages, in equity for an injunction, or of an indictment as a public offense": 1 Wood on Nuisances, sec. 611. "Any indecent exposure of one's person in a public place, in the presence of

several persons, is a public nuisance, . . . because it shocks the moral sensibilities, outrages decency, and is offensive to those feelings of chastity that people of ordinary respectability entertain": 1 Wood on Nuisances, sec. 57. So, for the same reason, the exhibition in public of obscene pictures, prints, books or devices are common nuisances: 1 Wood on Nuisances, secs. 65, 68.

In *Nolin v. Mayor etc.*, 4 Yerg. 163, the act incorporating the town of Franklin authorized the city council to enact and pass laws to prevent and remove nuisances. A law was passed by the council inflicting a penalty of five dollars on any person who exhibited a stud horse in the town. The court said: "Was this a nuisance within the meaning of the act of incorporation? Keeping hogs in a market town has been so holden (Salk. 460); as are ale-houses, gaming-houses, brothels, booths and stages for rope-dancers, mountebanks and the like: 1 Hawkins' Pleas of the Crown, c. 75, sec. 6. The exhibition of these in the streets would be clearly a nuisance; and we think as certainly showing and keeping a stud horse in the town is. The corporation law was warranted by the charter."

As a rule, a jack is kept for one purpose only, and that is, the propagation of his own species and mules. He has a loud, discordant bray, and, as counsel say, frequently "makes himself heard, regardless of hearers, occasions or solemnities." He is not a desirable neighbor. The purpose for which he is kept, his frequent and discordant brays, and the association connected with him bring the keeping of him in a populous city or town "within the legal notion of a nuisance." So far as the facts appear to us, section 2 of the ordinance in question is valid.

¹⁷ In this case we cannot inquire into the regularity of the proceedings of the mayor's court. The writ of habeas corpus cannot be legally converted into a writ of error. "The great object of the writ is the liberation of those who may be imprisoned without sufficient cause, and to deliver them from unlawful custody. It is not the function of this writ to inquire into or correct errors. But its object is to require the person who answers it to show upon what authority he detains the prisoner. If the person restrained of his liberty is in custody under process, nothing will be inquired into, by virtue of the writ, beyond the validity of the process upon its face, and the jurisdiction of the court by which it was issued": *State v. Neel*, 48 Ark. 289, 3 S. W. 631.

Judgment affirmed.

Nuisances.—Under a general grant of power over nuisances, a town or city may declare a thing a nuisance which in fact is one. But it cannot declare that to be a nuisance which is not so in fact: *Harrison v. Lewistown*, 153 Ill. 313, 46 Am. St. Rep. 893, 38 S. E. 628; *St. Louis v. Heitzeberg*, 141 Mo. 375, 64 Am. St. Rep. 516, 42 S. W. 954. The bleating of calves kept overnight at a slaughter-house, to be killed the next day, is a nuisance, and will be enjoined at the suit of a person living near by: *Bishop v. Banks*, 33 Conn. 118, 87 Am. Dec. 197. And the keeping of jacks and stallions, and standing them for mares in plain view of a dwelling-house, may be prohibited by injunction: *Farrell v. Cook*, 16 Neb. 488, 49 Am. Rep. 721.

RUST LAND AND LUMBER COMPANY v. ISOM.

[70 Ark. 99, 66 S. W. 434.]

APPELLATE PROCEDURE—Affidavit on Appeal Prematurely Made.—An affidavit that the appeal is not taken for the purpose of delay, but that justice may be done, required by the statutes of Arkansas, though made before the judgment appealed from was rendered, is a substantial compliance with the statute, and the appeal will not be dismissed. (p. 69.)

JURY TRIAL—Instructions Not Applicable to the Evidence.—An instruction that if the jury find that one under whom the defendant claims held actual, continuous, adverse, and uninterrupted possession for more than ten years before the commencement of the suit, the verdict should be for the defendant, is abstract, and constitutes reversible error, when there is no evidence of such a holding, and the undisputed testimony shows that the lands were wild and unoccupied. (p. 70.)

ADVERSE POSSESSION, Taken Under a Conveyance, Cannot Extend Beyond the Lands Described Therein to other lands mistakenly believed by the grantee to be included in his deed, but of which he did not take possession. (p. 71.)

EVIDENCE—Duty of Court to Limit Effect of.—The admission of a conveyance of lands adjoining those upon which the defendant had cut timber can be justified only for the purpose of showing an honest misapprehension of the boundary, and the jury should be so informed, and instructed that it is not evidence of title to lands claimed by the plaintiff, but not described therein. (p. 71.)

CONFUSION OF GOODS.—If the Defendant Cuts Timber on plaintiff's land and converts it into staves, which he mingles with staves of his own, it is not necessary, to entitle the plaintiff to recover, that he prove that the intermingling was with the intention of preventing him from identifying the staves cut from his land. (p. 72.)

REPLEVIN—Confusion of Goods—When Does Not Prevent Recovery in.—If a defendant owning staves of the same kind, quality, and value as the plaintiff, intermingles them without the fault of the latter, so that they cannot be separated, replevin lies for the part owned by the plaintiff, to be taken out of the mass, where no advantage would result to either by getting the identical staves owned by him. (p. 73.)

Action to recover staves cut by the defendant on that part of section 8, in township 16 north, range 16 west, lying west of Lake Grampus. The defendant claimed to have purchased the timber from one Thornton, and was permitted to offer in evidence a conveyance under which Thornton claimed title, but which did not include any part of the land claimed by the plaintiff, but did embrace adjacent lands in the same section, but on the east side of the lake. Thornton as a witness was, against the objection of the plaintiff, permitted to testify to the taking possession of the lands described in the deed under which he claimed and to his subsequent possession of them, but it was admitted that the lands claimed by the plaintiff were wild and unimproved, and were west of the lake, while those claimed by Thornton were east of it. Verdict and judgment for the defendant, and the plaintiff appealed.

G. W. Norman, for the appellant.

Robert E. Craig, for the appellee.

102 RIDDICK, J. This is an action of replevin brought by the Rust Land and Lumber Company against G. W. Isom to recover two thousand two hundred pipe staves. The action was commenced before a justice of the peace, who gave judgment in favor of the plaintiff, and the defendant took an appeal to the circuit court. On the calling of the case in the circuit court, the plaintiff moved the court to dismiss the appeal for the want of a proper affidavit. The affidavit for appeal made by the defendant is in proper form, and was filed on the same day the justice gave judgment. But the trial before the justice of the peace commenced on the third day of June, though the judgment was not rendered until next day. It seems that the defendant, anticipating an adverse decision, made the affidavit for an appeal on the morning of June 3d, and left it with his attorney, who filed it after the rendition of the judgment next day. I am inclined myself to the opinion that this affidavit, being made before the rendition of the verdict and judgment, was premature, and feel doubtful as to its sufficiency, but a majority of the judges are of the opinion that the affidavit, though irregular in having been made before the judgment, was a substantial compliance with the statute requiring the applicant for appeal "to make and file with the justice an affidavit that the appeal is not taken for the purpose of delay, but that justice may be done." Moreover, our statute regulating appeals from justices of the peace provides for amendments to bonds

and affidavits executed for the appeal, "so that," to quote the language of the statute, "no such appeal shall be dismissed for want of jurisdiction because of any defect in the affidavit or obligation for the appeal or order granting the appeal, or any defective entry made or informal judgment rendered" by the justice: Sandel & Hill's Digest, sec. 4438. This provision evinces an intention of the legislature that appeals from justices of the peace should not be dismissed on narrow and technical grounds, when the applicant for the appeal has endeavored to comply with the statute regulating the manner of taking appeals. It thus appears that there are substantial reasons in favor of the ruling of the circuit court that the mere fact that an affidavit was made a short time before the judgment appealed from was delivered did not render it nugatory, where it was filed after the judgment, and in other respects conformed to the ¹⁰³ requirements of the statute. The contention of appellant on that point is therefore overruled.

On the trial the evidence showed that the defendant, without the consent of the plaintiffs, cut timber upon its land, and converted it into staves. The defendant claimed that he purchased the staves from one Thornton. The circuit judge, at the request of the defendant, instructed the jury that if Thornton and those from whom he claimed title "had held actual, continuous, adverse and uninterrupted possession of the lands from which the timber was cut for more than seven years before the institution of the suit, the verdict should be for the defendant." This instruction, to the giving of which plaintiff saved proper exceptions, was entirely abstract. Thornton did not testify that he had ever held possession of the lands claimed by the plaintiff. On the contrary, the undisputed testimony was that those lands were wild and unoccupied. Thornton did testify that his father took possession of lands described in a deed from Moon to him, but that deed did not purport to convey the land claimed by the plaintiff. The only land in section 8 that such deed purported to convey was east of Lake Grampus, and possession of that land could not affect the title of plaintiff to lands west of the lake, even though Thornton believed that his deed covered that land also. There was, as we see it in the transcript, no evidence whatever to justify the jury in finding that Thornton had title to the land claimed by plaintiff, on which the timber was cut, by statute of limitation or otherwise, and that question should not have been submitted to them for decision. The testimony of Thornton that his father and he

had held adverse possession of lands conveyed by Moon to him was incompetent, for it had no bearing on the question at issue, which was whether the staves were cut from the lands owned by plaintiff west of the lake. Plaintiff did not claim the land conveyed by Moon to Thornton, and there was no question as to the title of those lands involved in the case. The tendency of this evidence of Thornton, and the instruction based on it, above noticed, was to becloud the real matters at issue, and mislead the jury; and we are therefore of the opinion that the evidence should have been rejected, and that the court erred in giving the instruction as to adverse possession.

The only legitimate basis for introducing the deed from Moon to Thornton was not to show title in Thornton to the lands claimed ¹⁰⁴ by the plaintiff, for, as before stated, that deed did not purport to convey such land, but to show that the defendant had the right to cut timber on the land adjoining those owned by plaintiff, and in connection with the evidence to show that he cut the timber of plaintiff innocently, under an honest misapprehension as to the location of the boundary line between the land of plaintiff and that of Thornton. The jury should have been admonished that the deeds of Thornton were no evidence of title to the land claimed by the plaintiff, and that they could only be considered in determining the question as to whether the defendant was innocent of intentional wrong.

The evidence on the trial showed very clearly that at least a portion of the staves replevied were made by defendants from timber cut by him on plaintiff's land without his consent, and then converted into staves. The evidence tended to show that defendant piled these staves with other staves owned by him, and they were thus so mingled that the particular staves owned by the plaintiff could not be identified. The court instructed the jury on this point that, before they could find for the plaintiff, it must be shown either that it was the owner of all the staves replevied, or, if it owned only a portion of the staves, it must be shown that these staves had been mixed and mingled by defendant with the staves belonging to him, "with the intention of preventing plaintiff from identifying the staves cut from its land."

No doubt, the rule that where one willfully and wrongfully mixes his property with that of another, so that the property of neither can be distinguished, gives to the innocent party the whole of the mixed property, was intended to prevent fraud, and to take away from the evil-disposed the incentive to deprive

another of his property by mixing it with his own so that it could not be identified. While the rule was intended to prevent a mixture for that purpose, it is not necessary for the innocent party to prove that the mixture was actually made with that intent, for in most cases that would be difficult to do. For instance, take this case as an illustration: If the defendant knew that the timber which he cut belonged to plaintiff or some other person, and that he had no right to cut it, yet willfully and wrongfully entered upon this land, cut timber, and converted it into staves, and afterward mixed these staves with staves belonging to himself, so that the property of neither could be identified or distinguished, it would certainly not ¹⁰⁵ be necessary for the plaintiff to go further, and show that the mixture was made to prevent plaintiff from identifying his staves. We apprehend that in such a case it would be entirely immaterial whether he mixed them for that purpose, or only for the purpose of making a more convenient shipment or sale. In either case the mixture would have been willfully and wrongfully made by defendant, and he should suffer the loss if any be caused by such act. We are therefore of the opinion that the instructions given on this point placed a greater burden on plaintiff than the law required, and were to that extent erroneous and prejudicial.

Another question presented by the facts of this case, but which does not seem to have been discussed at the trial below, is whether, if the mingling was innocently done, and if the staves mingled were all of the same kind, quality and value, replevin may not be maintained by plaintiff, notwithstanding the particular staves cannot be identified. If the staves are of the same kind, quality and value, and if no advantage would result to either party by getting the identical staves owned by him, even if that were possible, the general rule is that replevin will lie for the number owned by the plaintiff; to be taken out of the mass, especially when the mingling was not brought about by his act. This rule is generally followed by the courts of this country, including, it seems, the supreme court of the United States: *Eldred v. Oconto Co.*, 33 Wis. 141; *Peterson v. Polk*, 67 Miss. 163, 6 South. 615; *The Idaho*, 93 U. S. 585; *Cobbey on Replevin*, 2d ed., secs. 399-404.

We do not understand that this court has ever distinctly decided to the contrary. The case of *Hart v. Morton*, 44 Ark. 450, may seem at first glance to be a decision of that question,

but an examination of the facts of the case will show that this is not so. The plaintiff in that case purchased cotton from a tenant subject to the lien of the landlord. At the time of his purchase the cotton was in the field unpicked. Later, the landlord, who was the defendant in the case, also purchased the interest of the tenant. There had been no separation of the rent cotton from the other at the time of this purchase. Afterward the landlord himself weighed out the cotton, to determine the amount of rent and other cotton. But this was not a separation binding on either party, and the cotton was remixed after being weighed. It is very plain, we think, that the claim of the plaintiff in that case was for an undivided interest, and the court, speaking of it as an undivided share, properly held ¹⁰⁸ that replevin would not lie. But the headnote prefixed by the reporter to that case indicates that the court went further, and decided the question under consideration here; but we think the reporter was mistaken in this, and that his headnote is to that extent misleading.

We have many other cases of that kind holding that replevin will not lie by one tenant in common against his cotenant to recover his undivided share of the common property. The reason that underlies these decisions is that until division has been made neither of the parties owns any particular part of the property, more than the other, and neither has the right to the exclusive possession of any particular portion of it. We have also held that, when cotton has been innocently mixed and baled, replevin will not lie for a part of the bale; and this is clearly correct, for division in kind cannot then be made without injury to the other party. For, if the bale be torn to pieces, the cotton would have to be rebaled at additional expense: *Moseley v. Cheatham*, 62 Ark. 134, 34 S. W. 543; *Washington v. Love*, 34 Ark. 93; *McKinnon v. May*, 39 Ark. 442.

But this case belongs to neither of these classes of cases. The parties here are not tenants in common. The plaintiff owns a certain number of staves, which, without its fault, have been mixed by defendant with other staves of his own. Conceding that this was innocently done, yet, if the staves mingled are of the same kind, quality and value, a majority of us are of the opinion that plaintiff can in this action recover his staves, or an equal number to be taken from the common mass, if the separation can be made without injury. The plaintiff, as we have stated, was not responsible for the mingling, and whether, if it

had been, replevin would lie at its instance and for its benefit, we need not determine.

For the errors stated, the judgment is reversed and the cause is remanded for a new trial.

Title by Confusion and accession is considered in the monographic notes to *Pulcifer v. Page*, 54 Am. Dec. 583-597; *Gaskins v. Davis*, 44 Am. St. Rep. 444-448. If one unlawfully mixes and confuses his goods with those of another, so that they cannot be distinguished, the innocent party becomes entitled to the whole: *First Nat. Bank v. Schween*, 127 Ill. 573, 11 Am. St. Rep. 174, 20 N. E. 681; *Little Pittsburg etc. Min. Co. v. Little Chief etc. Min. Co.*, 11 Colo. 223, 7 Am. St. Rep. 226, 17 Pac. 760. And he may recover them in replevin: *Jenkins v. Steanka*, 19 Wis. 126, 88 Am. Dec. 675.

When *Replevin* or claim and delivery will lie is considered in the monographic note to *Sinnott v. Felock*, 80 Am. St. Rep. 741-767.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY v. WILSON.

[70 Ark. 136, 66 S. W. 661.]

APPELLATE PROCEDURE.—On Appeal it is No Longer a Question of the Preponderance of Evidence, but only whether it was legally sufficient to support the verdict. (p. 76.)

RAILWAYS.—Duty of to Provide Fire in Waiting-room.—If one goes to a railway depot to take passage on a train, and at a time when the weather is such as to require a fire in the waiting-room to make it comfortable, it is the duty of the railway company to build and keep a fire therein, and if it fails to do so, and the intending passenger suffers injury in consequence, he is entitled to recover therefor. (p. 77.)

RAILWAYS.—A Person in Charge of a Railway Station Has Apparently Power and Authority requisite to do and effectuate the business of the company at that station. He has control over the depot and authority to exclude persons therefrom who persist in violating reasonable regulations prescribed for their conduct. (p. 77.)

RAILWAYS.—Liability of for Misconduct or Neglect of Station Agents.—If one goes to a railway depot to take passage on a train, and the station agent knowingly permits it to be locked, or knowingly permits it to remain locked after being notified that it is locked, so that an intending passenger is restrained from going in and out, the corporation is liable. (p. 77.)

RAILWAYS.—Liability for Injury or Annoyance at Station to Intending Passenger.—While it is the duty of railway corporations to exercise ordinary care to protect intending passengers from unreasonable annoyance, and from insult and injury from turbulent, riotous, or disorderly persons, yet to make a corporation liable in damages, it must be shown that there was an injury, that the agent

in charge of the station had opportunity to know that the injury was threatened, and that by his prompt intervention he could have prevented or mitigated it. (p. 78.)

DAMAGES.—There Can be No Recovery for Mental Anguish Unaccompanied by Personal Injury, where there is no willful, wanton, or malicious wrong done. (p. 79.)

JURY TRIAL.—Abstract Instructions, Not Supported by the Evidence, are Erroneous, and require a reversal, as where the jury is charged that they should find against a railway corporation, if its agent used toward or to a plaintiff, or in her hearing, any profane, obscene, or boisterous language, which insulted her or injured her feelings, when there is no evidence of the use of any such language. (p. 79.)

DAMAGES, PUNITIVE, for Misconduct of Servant.—A railway corporation is not liable in punitive damages for the tort of its servant, unless it was in the line of his employment, and was willful, wanton, and malicious. (p. 79.)

The plaintiff, a minor, colored girl, sued by her next friend to recover for damages alleged to have been suffered by her in December, 1898, at the depot of the defendant corporation, whither she went for the purpose of taking passage on one of its trains. In her complaint she alleged that she went into the colored waiting-room, and was there compelled to remain for about an hour and until the arrival of the train; that soon after going into the room she was imprisoned by the defendant's agents and servants by their locking the only door to the room; that she was frightened and insulted by profane and abusive language, and vile and insulting signs directed toward her, and that, notwithstanding her demands and entreaties, the door was kept locked by the defendant's servants, and they refused to build a fire, and she was made ill in consequence. The testimony tended to prove that the plaintiff, with other colored girls, went to take the train; that the waiting-room was locked by a white boy soon after they entered it, and remained locked until the train came; that to the request to the station agent to have a fire made and the door unlocked, he responded by cursing, and some white men came to the door and made insulting faces and cursed and called the girls "damn bitches," etc., but it did not clearly appear whether the agent knew of this or not. The plaintiff caught cold and was made sick. Verdict for the plaintiff for three hundred dollars compensatory, and two hundred dollars punitive, damages. The defendant appealed.

Dodge & Hohanson and J. E. Williams, for the appellants.

Murphy & Mehaffy, for the appellees.

¹⁴⁰ WOOD, J. We will consider the questions in the order presented by appellant's counsel.

1. It is contended that the cause should be reversed, because the jury failed to observe the rule of preponderance of the testimony. When the cause reaches this forum, it is no longer a question of preponderance, but only of the legal sufficiency of the evidence to support the verdict: *St. Louis etc. R. R. Co. v. Kilpatrick*, 67 Ark. 47, 54 S. W. 971; *Catlett v. Railway Co.*, 57 Ark. 461, 38 Am. St. Rep. 254, 21 S. W. 1062.

2. Appellant objects to the following instruction: "If plaintiff went to defendant's depot on the day mentioned in the complaint, to take passage on defendant's train, and at that time the weather was such as to require a fire in the waiting-room to make it comfortable, it was defendant's duty to build and keep a fire in said waiting-room; and, if it failed to do so, and plaintiff suffered in consequence of defendant's failure to build and keep such fire, your verdict will be for the plaintiff." It was the duty of railroads, independent of the statute of March 31, 1899, to provide reasonable accommodations for passengers at their stations: *McDonald v. Chicago etc. R. R. Co.*, 26 Iowa, 138, 96 Am. Dec. 114. This duty requires the exercise of ordinary care to see that station-houses are provided with reasonable appointments for the safety and essential comfort of passengers, or those intending to become passengers, while they are waiting for trains: *Caterham Ry. Co. v. London etc. Ry. Co.*, 87 Eng. C. L. 410; 1 *Fetter on Carrier of Passengers*, secs. 249, 250; *Texas etc. Ry. Co. v. Cornelius*, 10 Tex. Civ. App. 125, 30 S. W. 720; *Hutchinson on Carriers*, secs. 516-521, inclusive; 2 *Wood on Railroads*, sec. 1338; *Elliott on Railroads*, sec. 1590.

By the exercise of such care as ordinary prudence would suggest for reasonable comfort, it could hardly occur that a waiting-room, in midwinter, would be devoid of the means necessary to make it comfortably warm at the times when such rooms are needed to accommodate those intending to become passengers. A failure to provide such means is, therefore, at least *prima facie* evidence of negligence. It is insisted that the instruction "eliminated all question of diligence and negligence," and made the company an "insurer against the consequences of not having a fire in the waiting-room." But the company maintains that it was not negligent, because it built the fire in the waiting-room as requested. ¹⁴¹ It is not complaining of any latent defect or unforeseen exigency which ordinary care could have anticipated and prevented. It could not have been prejudiced, therefore, by the instruction in the form given. Moreover, it did not request the court to declare the law to meet the objection

it urges here to the instruction. Giving it as requested was not reversible error: *St. Louis etc. Ry. Co. v. Barnett*, 65 Ark. 255, 45 S. W. 550.

3. The court also gave the following: "If plaintiff went to defendant's depot to take passage on defendant's train, and defendant's agent knowingly permitted it to be locked, or knowingly permitted it to remain locked after being notified that it was locked, so that plaintiff was restrained from going in and out, your verdict will be for the plaintiff."

"A person," says Mr. Wood, "who is in charge of a station by a railway company has apparently all the power and authority requisite to do and effectuate the business of the company at that station. He has control over the depot, and authority to exclude persons therefrom who persist in violating the reasonable regulations prescribed for their conduct": 1 Wood on Railroads, sec. 165. The authority of railroads to make and carry into execution all reasonable regulations for the conduct of all persons resorting to its depots, so as to protect those who are, or intend to become, its passengers from unreasonable annoyances, insults and injuries, cannot be questioned: 1 Fetter on Carrier of Passengers, sec. 247; *Commonwealth v. Power*, 7 Met. 596, 41 Am. Dec. 465; *Elliott on Railroads*, sec. 303. This authority is the necessary correlate of the duty to provide reasonable accommodations; for a station-house to which drunken, profane, obscene, abusive, riotous and otherwise disorderly persons could resort with impunity would not be either comfortable or safe. The willful or negligent failure of railroads to make and enforce such reasonable regulations would render them liable in damages for any injuries directly resultant to those who repaired to their stations for the purpose of becoming passengers.

If appellant's station agent, against the protest of appellee, knowingly permitted the only means of ingress and egress to the waiting-room, where appellee was properly in waiting to become its passenger, to be locked, and to be so continued for any length of time, when same by the exercise of ordinary care could have been prevented or discontinued, he was guilty of a tort, and for the wrong thus inflicted upon appellee appellant was liable in damages. For, ¹⁴² in the unlawful imprisonment of the person of appellee and the deprivation of her personal liberty, even though for a moment, without her consent, there was an actionable wrong, an injury to her person, however slight: *Field on Damages*, sec. 679; *Cooley on Torts*, p. 195, sec. 169; ³ *Sutherland on Damages*, sec. 1257.

Appellant does not contend that its agent exercised ordinary care to prevent the locking of the door, or to have it unlocked after being notified. Its defense on this point is confined to a denial of all knowledge of any such occurrence. The instruction, in the form given, was therefore not prejudicial.

4. Appellant insists that the court erred in giving the following: "3. You are instructed that it is the duty of a railroad company to protect all persons who are at its stations for the purpose of taking passage on its trains from annoyances, insults and abuse; and if defendant's agent used toward or about the plaintiff, or in plaintiff's hearing, any profane, obscene or boisterous language, which language insulted or injured plaintiff's feelings, your verdict should be for the plaintiff."

"6. If you find for the plaintiff in this case, her actual damages will be such sum of money as will be a just and fair compensation for all the pain and anguish, if any, both of body and mind, suffered by plaintiff on account of the injuries received."

"7. If you find for the plaintiff, you may, in addition to actual damages, award punitive damages as a punishment of the defendant."

What we have already said sufficiently indicates the duty of railroads to those intending to become passengers at their stations. While it is their duty to exercise ordinary care to protect them from unreasonable annoyances, and from insults and injuries, from turbulent, riotous or disorderly persons, yet to make them liable in damages it must be shown that there was an injury, that the agent in charge of the station "had knowledge or opportunity to know that the injury was threatened, and that by his prompt intervention he could have prevented or mitigated it": *Sira v. Wabash R. R. Co.*, 115 Mo. 127, 37 Am. St. Rep. 386, 21 S. W. 905; *Spohn v. Missouri Pac. Ry. Co.*, 87 Mo. 74, and authorities cited.

The duty of railroads in this respect is, therefore, not absolute, as the first part of the third instruction assumes. This part of the instruction, however, could not be said to be prejudicial, for the ¹⁴³ latter part limits the application of the doctrine to "profane," "obscene," or boisterous language used only by appellant's agent. But the latter part of the instruction is abstract, erroneous and prejudicial. We have searched the record in vain for evidence that appellant's agent used profane, obscene or boisterous language toward or about appellee. The only evidence in the record of any improper language used by the agent at all was that he "began to swear a little at Dick,"

the boy who requested him to make a fire. Dick Canady, the boy who requested the agent to make a fire, said the agent "cussed," and told him to go on. There is no proof that he cursed appellee, or that what he said to Dick Canady in her hearing was calculated to and did insult her feelings. There is no proof of what the language was. It is not shown to have been said for the purpose of insulting appellee. As the language was not addressed to appellee, in the absence of any evidence as to what the language was, the inference that it was said for the purpose of insulting appellee is not warranted. There is no proof of any connection between the cursing and the acts resulting in physical injury to appellee. Whether the use of profane, obscene and abusive language by station agents, when uttered about or in the presence and hearing of those intending to become passengers, while at stations, and for the purpose of insulting them, or injuring their feelings, would alone make the railroads liable for the mental suffering thereby produced, we need not decide; for that state of facts is not presented by the proof in this record.

It is certain there could be no recovery for mental anguish unaccompanied by personal injury, where there was no willful wanton or malicious wrong done. Whether there could be recovery for mental suffering alone, where there was willful, wanton, or malicious wrong done, we reserve for decision.

5. The complaint alleges three separate grounds for recovery, to wit, the failure to build a fire, the failure to prevent the locking of the door, and the failure to protect appellee from insulting remarks. The sixth instruction, on the measure of damages, allows the jury to find for all the pain and anguish of both body and mind, without discrimination or designation of the specific grounds upon which the cause of action is based. This instruction, in view of what we have just said in reference to the third, is erroneous; for under it, in connection with the third, *supra*, the jury were warranted in finding for mental suffering on account of profane, obscene and boisterous language of the station agent. ¹⁴⁴ The jury might have found such damages. Whether or not they did so, and, if so, what amount on this account entered into the verdict, it is impossible for us to tell. The instruction was erroneous and prejudicial.

6. It follows, also, that it was error to give the seventh as to punitive damages, since the jury may have included punitive damages in their verdict for the use of profane, obscene or boisterous language used by the station agent. Furthermore, under the proof it did not follow as matter of law that the jury

might find punitive damages, if they found for the appellee. The jury may have found that appellant was liable for compensatory damages on one of the alleged grounds of liability, but it did not follow that because they so found they should also find punitive damages on said ground, unless they should further find that the tort or wrong of the servant in the particular alleged was in the line of his employment, and was willful, wanton, or malicious. The instruction should have been framed so as to leave the jury to determine whether or not the elements essential to punitive damages existed, in connection with any or all of the alleged grounds of liability set forth in the complaint for actual or compensatory damages. We find no other reversible error.

The other questions may not again arise. For the errors indicated, the judgment is reversed and the cause is remanded for new trial.

A Railroad Station-house is open to the traveling public, and any person desiring to go upon the cars has the right to go into such house at the proper time, and remain there until the departure of the train, whether he has purchased a ticket or not: Harris v. Stevens, 31 Vt. 79, 73 Am. Dec. 337. And it is the duty of the railway company to keep the building in a safe and proper condition: Jordan v. New York etc. R. R. Co., 165 Mass. 346, 52 Am. St. Rep. 522, 43 N. E. 111; Fullerton v. Fordyce, 121 Mo. 1, 42 Am. St. Rep. 516, 25 S. W. 587.

ROTH v. MERCHANTS' AND PLANTERS' BANK

[70 Ark. 200, 66 S. W. 918.]

PATENT RIGHTS—Recovery of Purchase Price, Though Note Given Therefor is Void.—A statute requiring every negotiable instrument given for any patent medicine, implement, substance, or instrument of any kind to be executed upon a printed form, and to show on its face for what it was given, otherwise such instrument shall be void, does not prevent the vendor to whom an instrument was given, which did not comply with the statute, from maintaining an action for the purchase price. The object of the statute is to save to the vendee all the defenses he may have to an action on the note for the purchase money and to prevent the loss of such defense by a transfer to an innocent holder before maturity. (p. 81.)

RES JUDICATA.—A Judgment Against a Holder of a Negotiable Instrument, for noncompliance with the statute, requiring it to be on a printed form and to show the consideration, does not bar an action for the purchase price of the article on account of which the instrument was executed. (p. 82.)

Austin & Taylor, for the appellant.

White & Altheimer, for the appellees.

²⁰¹ **BATTLE**, J. Louis Roth, the appellant, purchased an undivided one-fourth interest in a patent known as the "Eclipse Folding Wagon Step," and agreed to pay fifteen hundred dollars therefor. He paid one thousand dollars in cash, and executed his note to C. P. Thornton, his vendor, for five hundred dollars in payment of the balance. In due course of trade, for a valuable consideration, without notice and before maturity, the Merchants' and Planters' Bank, of Pine Bluff, became the owner of this note. At maturity the maker, Louis Roth, refused to pay the note, and in a suit brought in the Columbia circuit court against him and C. P. Thornton, as indorser, he filed an answer, and, after admitting the execution of the note to C. P. Thornton and transfer of same to plaintiff, Merchants' and Planters' Bank, pleaded "for a complete defense against the note, . . . that ²⁰² it was given by him to his codefendant for an interest in a patent right, and was not on a printed form, and did not show on its face that it was executed in payment of such patent right, as required by sections 493 and 494 of Sandel & Hill's Digest, and the said note is therefore void"; and the court, sitting as a jury, found that issue in favor of the defendant, and rendered judgment accordingly. Suit was then brought in the Jefferson circuit court on account for the balance of the purchase money by the bank, and, as the account was not assignable by statute, C. P. Thornton, the assignor, was joined as plaintiff. To this suit the appellant, Louis Roth, pleaded the judgment of the Columbia circuit court declaring the note void, as a bar to the right of appellees to recover upon the original consideration. The circuit court held that the plaintiffs in the latter suit were entitled to recover, and rendered judgment in their favor for the amount sued for, and the defendant appealed.

Section 493 of Sandel & Hill's Digest, upon which the appellant's defense to the action against him in the Columbia circuit court was based, is as follows: "Any vendor of any patent machine, implement, substance, or instrument of any kind or character whatsoever, when the said vendor of the same effects the sale of the same to any citizen of this state on a credit, and takes any character of negotiable instrument, in payment of the same, the said negotiable instrument shall be executed in printed form, and show upon its face that it was executed in considera-

tion of a patented machine, implement, substance, or instrument, as the case may be, and no person shall be considered an innocent holder of the same, though he may have given value for the same before maturity, and the maker thereof may make defense to the collection of the same in the hands of any holder of said negotiable instrument, and all such notes not showing on their face for what they were given shall be absolutely void."

The object of this statute was to save a vendee of "any patent machine, implement, substance, or instrument of any kind or character whatsoever," all the defenses he may have to an action on his note for the purchase money, and to prevent the loss thereof by a transfer of the note to an innocent holder before maturity. The failure to comply with the statute does not affect the validity of the sale, but renders only the note absolutely void. The penalty does not reach beyond the object to be accomplished. Though the note may be void, the vendor can recover whatever may be due ²⁰³ him on the contract of sale from the vendee: *Tillman v. Thatcher*, 56 Ark. 334, 19 S. W. 968; *Marks v. McGhee*, 35 Ark. 217; *Tucker v. West*, 29 Ark. 401; *Stratton v. McMakin*, 84 Ky. 641, 4 Am. St. Rep. 215; *Iron Mountain etc. R. R. Co. v. Stansell*, 43 Ark. 275.

The defense of appellant to the action instituted in the Columbia circuit court was in the nature of a plea of abatement. It did not reach the merits of the case, but the validity of the note only. The only thing adjudicated by the judgment of that court was the validity of the note sued on. This judgment was no bar to an action upon the contract of sale.

The effect of a judgment upon causes of action is unlike its effect upon defenses. The defendant in an action is required to set up all his defenses to the same. "A valid judgment for the plaintiff sweeps away every defense that should have been raised against the action; and this, too, for the purpose of every subsequent suit, whether founded on the same or a different cause": *Ellis v. Clarke*, 19 Ark. 421, 70 Am. Dec. 603; *Bell v. Fergus*, 55 Ark. 538, 18 S. W. 931; *Davis v. Brown*, 94 U. S. 423.

As to causes of actions, the rule is stated by the supreme court of the United States in *Russell v. Place*, 94 U. S. 608, as follows: "It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation to

the judgment it must appear either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record, as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered—the whole subject matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible.” It further said in the same case that, “to render the judgment conclusive, it must appear by the record of the prior suit that the particular matter sought to be canceled was necessarily tried or ²⁰⁴ determined—that is, that the verdict in the suit could not have been rendered without deciding that matter; or it must be shown by extrinsic evidence, consistent with the record, that the verdict and judgment necessarily involved the consideration and determination of the matter.”

In *Shaver v. Sharp County*, 62 Ark. 78, 34 S. W. 262, it is said: “That which has not been tried cannot have been adjudicated. . . . That which is not within the scope of the issues presented cannot be concluded by the judgment”: See, also, *Dawson v. Parham*, 55 Ark. 286, 18 S. W. 48; *McCombs v. Wall*, 66 Ark. 336, 50 S. W. 876; *Cromwell v. County of Sac*, 94 U. S. 351; *Davis v. Brown*, 94 U. S. 423.

The same rule obtains as to cross-claims, setoffs and recoupments. The defendant in an action against him is not bound to set up such claims, if he has them, but it is generally optional with him to do so or not: *McWhorter v. Andrews*, 53 Ark. 307, 13 S. W. 1099; 21 Am. & Eng. Ency. of Law, 1st ed., 224, and cases cited.

The judgment of the Jefferson circuit court is affirmed.

Patent Right.—A statute requiring the words “given for a patent right” to be inserted in any obligation, the consideration whereof is a patent right, is valid; and a promissory note taken by a vendor of a patent right which does not contain these words is inoperative as between the parties and those buying with notice: *New v. Walker*, 108 Ind. 365, 58 Am. Rep. 40, 9 N. E. 386. See, further, *People’s State Bank v. Jones*, 26 Ind. App. 583, 84 Am. St. Rep. 310, 58 N. E. 852; *Mason v. McLeod*, 57 Kan. 105, 45 Pac. 76, 57 Am. St. Rep. 327, and cases cited in the cross-reference note thereto.

McFARLANE v. GROBER.

[70 Ark. 371, 69 S. W. 56.]

LACHES—Rule of Does not Apply to Legal Actions.—The doctrine of laches does not apply to a case in which the plaintiff does not ask equitable relief, but seeks in a court of law to enforce a plain legal title in an action not barred by any statute of limitations. (p. 85.)

TAX TITLE—Who may Acquire.—One who is under no obligation to pay taxes may strengthen his title to lands by purchasing at a tax sale. Hence, if he is in possession as grantee of the owner of a life estate under a conveyance purporting to convey in fee, and is holding adversely to the remaindermen, he may purchase and assert an outstanding tax title, created when he was not in possession and was under no obligation to pay taxes. (p. 86.)

STATUTE OF LIMITATIONS—Disability of One Plaintiff.—A married woman, against whom the statute of limitations does not run and who is a cotenant with her brother, cannot, on purchasing his share, recover the whole property if the statute of limitations has run against his claim. (p. 86.)

Ejectment by Theresa Grober against the defendant, R. W. McFarlane, to recover possession of two hundred acres of land. This land belonged to Emile Grober, who, dying unmarried in 1867, left surviving as her heirs her father, John C. Grober, her brother, Rhinehold Grober, and her sister, the plaintiff. The father took possession of the land, claiming to be the owner, and in 1879 conveyed it to Americus McKissack, who, in 1883, conveyed to W. E. Gunter, who, in 1899, conveyed to the defendant. John C. Grober died in February, 1892. Rhinehold Grober, on April 26, 1899, conveyed to the plaintiff. Forty acres of the land had vested in the state by its forfeiture for nonpayment of taxes. The title of the state was acquired by W. E. Gunter, who conveyed to the defendant. The trial court decided in favor of the defendant as to the forty acres claimed under a tax title, and also as to one-half of the remainder, on the ground that the share of Rhinehold Grober had been lost through the operation of the statute of limitations, and as to the other half, gave judgment for the plaintiff. Both parties appealed.

T. B. Pryor and Hill & Brizzolara, for the appellant.

Benjamin T. Duval, for the appellee.

374 RIDDICK, J. This was an action of ejectment, which was, on motion of the defendant, transferred to the equity docket, and tried as an equity case by the judge of the circuit

court. But an examination of the defense set up by the answer shows, as we think, no sufficient ground for the transfer of the case to the equity docket. The defenses set up in the answer were legal defenses. The answer presented no defense calling for equitable relief, and the case should have been tried at law. But though the plaintiff objected to the transfer of the case to the equity docket, she does not now press that point as ground for reversal. The only substantial thing the transfer to equity effected was to bring the issues of fact presented before the judge for trial, instead of before a jury, and the case is now very much in the attitude of a case at law tried before the judge sitting as a jury, and afterward appealed to this court.

We have given the case careful attention, and our conclusion is that the finding of the circuit judge to the effect that Emile Grober was the owner of this land at her death, that under the law her father took only a life estate, and that after his death the title vested in Theresa Grober and Rhinehold Grober, the brother and sister of Emile Grober, is sustained by the law and the evidence: *Kelley v. McGuire*, 15 Ark. 555.

The testimony of Mrs. Matilda Jackson bearing on the execution of a deed from Emile to her father is not convincing to our minds, and we think the circuit judge was justified in rejecting it. As Theresa Grober was a married woman at the time of her sister's death, and remained so up to the time of the bringing of her action of ejectment, we think that it is clear she was not barred by the statute of limitations.

The doctrine of laches, invoked by the defendant, does not apply to a case where the plaintiff is not asking any equitable relief, but seeks only to enforce a plain legal title in a court of law, and where her action is not barred by the statute of limitations in reference thereto: *Rowland v. McGuire*, 67 Ark. 320, 55 S. W. 16; *Wilson v. Nichols*, 72 Conn. 173, 43 Atl. 1052; *Broadway Nat. Bank v. Baker*, 176 Mass. 294, 57 N. E. 603; *Wood on Limitations*, sec. 60, note a.

But whatever view may be taken of that question, the facts and circumstances in proof, we think, fully justified the circuit judge in overruling this defense and finding in favor of the plaintiff ³⁷⁵ on that issue. This disposes of the questions presented by the appeal of the defendant.

As to the cross-appeal, we must also say that no ground for reversal is shown. The forty acres claimed by the defendant

were, it is true, forfeited to the state for nonpayment of taxes after the death of Emile and before the expiration of the life estate held by John C. Grober. But neither McFarlane nor Gunter, who purchased this tax title from the state, were in possession of the land, or had any claim to it at the time it was forfeited, nor were they under any obligation to pay the taxes for which it was sold. Long after this tax sale, and when the title had become vested in the state, Gunter purchased the land from parties holding through conveyances from Grober purporting to convey the title in fee. Gunter believed that he was acquiring the title in fee, but, finding that this forty acres had been sold to the state for nonpayment of taxes, and that the state was the owner thereof, he purchased it from the state, and afterward sold it to McFarlane. One in possession of land under claim of title may strengthen his title thereto by the purchase of an outstanding title: *Coxe v. Gibson*, 27 Pa. St. 160, 67 Am. Dec. 454. While a tenant for life whose duty it is to pay the taxes will not be allowed to acquire a title against the owner of the fee by permitting the land to be sold for taxes—in other words, while one whose duty it is to pay the taxes will not be allowed to profit by a failure to discharge the duty—yet the rule does not apply here, for the claim of Gunter to the land was not in recognition of the rights of the plaintiff, but adverse to them. He was not in any way to blame for the forfeiture of the title to the state through the nonpayment of the taxes, and he stands in no such relation to the plaintiff as makes it unjust or inequitable that he should set up against her this title acquired from the state. We therefore think that the contention of the defendant on this point must be sustained: *Blackwood v. Van Vleit*, 30 Mich. 579; *Coxe v. Gibson*, 27 Pa. St. 160, 67 Am. Dec. 454; *Lybrand v. Haney*, 31 Wis. 230; *Cooley on Taxation*, 2d ed., 508.

Although, for the reason that she was a married woman, the statute of limitations did not bar the right of the plaintiff to recover the undivided half interest in the land owned by her, yet it commenced to run against Rhinehold Grober on the death of the life tenant, John C. Grober, if not before, and the conveyance of Rhinehold to his sister, the plaintiff, did not stop the statute, and ³⁷⁶ the right to recover the undivided interest owned by him was clearly barred before the commencement of this action. On the whole case, we think the judgment should be affirmed, and it is so ordered. •

Tax Sale.—It is a familiar rule that one under no obligation to pay taxes for which a sale was made is not precluded from acquiring a tax title to the property sold. One in the adverse possession of land does not impair his right to rely on the statute of limitations by purchasing the land at a tax sale and recording his deed: See the monographic note to *Cone v. Wood*, 75 Am. St. Rep. 230, 231, on who may purchase and enforce a tax title.

BUFFALO ZINC AND COPPER COMPANY v. CRUMP.

[70 Ark. 525, 69 S. W. 572.]

FOREIGN CORPORATIONS—Doing Business by—What is.—The institution and prosecution of an action are not a doing of business within the state within the meaning of the statute relating to foreign corporations. (p. 93.)

FOREIGN CORPORATIONS—Maintenance of Action by.—If a statute requires foreign corporations to do certain acts, and if they refuse, they shall not maintain any suit or action in any of the courts of the state, the doing of those acts, though not within the time prescribed by the statute, authorizes the corporation to proceed with the prosecution of an action previously pending. (p. 93.)

MINING.—A Lead, Lode, or Vein, as Those Words are Used in the Acts of Congress, Means any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rocks. It must be continuous in the sense that it can be traced through the surrounding rock, though slight interruptions in the mineral-bearing rock would not alone be sufficient to destroy the identity of the vein. Neither would a short partial closure of the fissure have that effect, if a little farther on it recurred again with mineral-bearing rock within it. (p. 94.)

MINING CLAIMS—Descriptions in Locations of.—Where the commencement point of a mine is described in the notice of location as beginning at the "northwest corner of Ed. Williams' 1-16, at a black oak post," it will be presumed that "Ed. Williams' 1-16" is a well-known natural object, until the contrary appears. (p. 95.)

MINING CLAIMS—Presumption of Regularity of Location of. As against the objection that there was no evidence of the posting of the notice of the location of a mining claim, if it appears that such claim was purchased from and conveyed by the supposed locators, and has been held by the vendee adversely to all the world for a longer time than the statutory period of limitations, it will be presumed that the location was regularly made. (p. 95.)

MINING CLAIMS.—The Failure to Record the Notice of the Location of a Mining Claim within the time prescribed by law is not material to claimant, if the notice is recorded before any adverse right is acquired. (p. 96.)

MINING CLAIMS—Rights Acquired by Adverse Possession of. Though the lands attempted to be located as mining claims are not then subject to location because of previous locations, yet if the claimants under the junior location take possession, and hold and develop the mine by work and labor performed, and continue the ad-

verse holding for a longer time than the period of limitations prescribed by statute, their claim is valid against everyone except the United States. (p. 96.)

MINING CLAIMS.—Abandonment is a Voluntary Act, and consists of the relinquishment of possession of the claim with an intention not to return and occupy it. It is purely a question of intention. (p. 96.)

MINING CLAIMS.—Abandonment, What is not.—The quitting of work upon a mining claim temporarily, except annual assessment work, on account of lack of transportation for the ore taken from the mine, does not amount to an abandonment, though the land is entered as a homestead by a third person, but without the consent of the claimant of the mine. (p. 97.)

MINING CLAIMS.—Failure to Do the Work on a Mining Claim Within the Time Prescribed by law does not forfeit it, if the locator, before any location is made, resumes work in good faith. After that no other person has a right to locate the mine. (p. 97.)

MINING CLAIMS are not Subject to Location until the rights of the former locator have come to an end. Any relocation before that time is void. (p. 98.)

MINING CLAIMS.—Proof of Forfeiture.—The forfeiture of a mining claim by failure of the owner to perform the annual labor required by law cannot be established except by clear and convincing evidence, and the burden of proof rests upon him who claims that a forfeiture has occurred. (p. 98.)

S. W. Woods, for the appellant.

W. F. Pace, for the appellees.

John B. Jones, amicus curiae.

530 BATTLE, J. This action involves the validity of mining claims. The Buffalo Zinc and Copper Company alleged in its complaint, substantially, as follows: It was duly organized as a corporation, under the laws of the state of Illinois, on the third day of June, 1887, for the purpose of doing a general mining and smelting business, and dealing in mineral lands. Since then it has been engaged in such business.

On the 6th of November, 1886, one Rose Ann Kaylor, in accordance with law, located a lead and lode mining claim, described as follows: "Beginning at the northwest corner of the southwest quarter of the southwest quarter of section 11, in township 17 north, and in range 15 west, and thence running north along the section line 1,500 feet, thence east 600 feet, thence south 1,500 feet, and thence west 600 feet to the place of beginning." Notice of this location was given, and was duly filed for record in the office of the recorder of the Harrison mining district, in which the land was then situated, and was recorded on the 8th of December, 1886; and was also

filed for record on the twenty-first day of January, 1888, in the office of the recorder of Marion county, where the land lies, and was duly recorded. This location was named and known as the "Bell Claim."

On the 6th of November, 1886, one Francis E. Blake lawfully located, as a lead or lode mining claim, the land lying in the county of Marion, in this state, and known and described as follows: "Beginning at the northeast corner of the said Bell claim, and thence running east 600 feet; thence south 1,500 feet; thence west 600 feet; and thence north 1,500 feet to the place of beginning; being a part of the west half of the southwest quarter and the southwest quarter of the northwest quarter of section 11, in township 17 north, and in range 15 west." Notice of this location was given, and was duly filed for record in the office of the recorder of the Harrison mining district, where the land was then situated, on the eighth day of December, 1886, and the same was duly recorded; ⁵³¹ and it was also filed for record in the office of the recorder of Marion county, on the twenty-second day of August, 1890, and was recorded. This location was named and known as the "White Eagle Mining Claim."

On the twentieth day of November, 1886, Rose Ann Kaylor and William Kaylor, her husband, for a valuable consideration, sold and conveyed to T. A. Blake all their right, title and interest in and to the White Eagle and Bell mining claims, and put him in possession of the same.

On the 4th of June, 1887, Francis E. Blake, T. A. Blake, and W. P. Beebe, the owners of the Bell and White Eagle mining claims, for a valuable consideration, sold and conveyed said claims to one Fred C. Exter, who, on the 27th of June, 1887, sold and conveyed them to the plaintiff, the Buffalo Zinc and Copper Company, and placed it in the possession of the same.

On the 19th of May, 1898, the plaintiff, in conformity with the law in such cases made and provided, made a corrected location of the White Eagle and Bell mining claims, so as to conform to the lead or lode of mineral pre-empted, and consolidated the two in one claim, and named it the White Eagle Lead or Lode Mining Claim. Notice of location was given, and was duly recorded, on the nineteenth day of May, 1898, in the office of the recorder of the Rush Creek mining district, where the mining claim was then located.

The defendants in this action attempted to make a location of a placer mining claim upon the lands upon which the mining

claims of the plaintiff are located. These lands were valuable for zinc ores found in them in leads or lodes, and are not subject to locations of placer mining claims; and the location of the defendants upon them are therefore void.

The defendants filed an application in the office of the proper land district for a patent to the lands, and notice of the application was published on the 16th of September, 1898. On the tenth day of November next following plaintiff filed, in the same office, an adverse claim to the same land; and proceedings on the application for a patent were suspended during the pendency of this suit.

Plaintiff asked for a decree canceling the placer location of the defendants, and declaring that it is the owner of the lands and entitled to their possession, and other relief.

⁵³² Frank Pace, S. J. Pace and Henry Pace brought an action against the plaintiff, Buffalo Zinc and Copper Company, S. W. Woods, and the defendants in the action instituted by the Buffalo Zinc and Copper Company, to wit, G. J. Crump, B. J. Carney, J. C. South, M. N. Dyer, Z. M. Horton, DeRoos Bailey, W. F. Pace, and Arthur N. Sager, to recover the possession of the land claimed by the Buffalo Zinc and Copper Company in its complaint, and claimed to be the owners by virtue of a placer mining location made on the eleventh day of April, 1898. The latter action was transferred to the equity docket, and by consent the two actions were consolidated and heard as one. Frank, S. J. and Henry Pace answered the complaint of the Buffalo Zinc and Copper Company substantially as follows: They admitted that Rose Ann Kaylor, on the sixth day of November, 1886, attempted to make the location named and known as the "Bell Claim"; and that Francis E. Blake, on the same day attempted to make the location named and known as the "White Eagle Mining Claim"; and denied all the other allegations in the complaint. They say that the pretended location of Rose Ann Kaylor was illegal, because one E. C. Bartlett, on the eleventh day of March, 1885, made a location of a mining claim on the same land, in the manner prescribed by law, which was named "Bon Ton," and was valid and subsisting on the 6th of November, 1886. They allege that the White Eagle mining claim was invalid, because one S. E. Williams, on the twelfth day of March, 1885, segregated and appropriated the land on which it was located by entering upon and locating thereon a mineral claim, known as the "Small Hope," in the manner and form required by

law, and that it was in full force when the White Eagle mining claim was located. They aver that, if the Buffalo Zinc and Copper Company acquired an interest or title in and to the lands in controversy by locating the White Eagle and Bell mining claims thereon, it abandoned and forfeited it on the fourteenth day of February, 1892, by entering and locating thereon a placer mining claim, and by permitting and causing one August Schmidt, on the thirteenth day of April, 1892, to enter the land as a homestead, and to occupy the same for a full period of five years, with the fraudulent intent of acquiring the same, through Schmidt, as agricultural lands. They aver that if the Buffalo Zinc and Copper Company acquired any interest or title in and to the lands upon which the Bell and White Eagle ⁵³³ mining claims are located, it forfeited the same by failing to do the assessment work required by law in such cases for the years 1893, 1894, 1895, 1896, and 1897. They alleged that they peaceably entered and located a placer claim upon the lands in controversy. They alleged that the Buffalo Zinc and Copper Company ought not to maintain their action, because it is a foreign corporation, and has not filed in the office of the Secretary of State a copy of its charter or articles of incorporation or association, and has not designated an agent, who is a citizen of this state, upon whom summons or other process may be served, and has not filed a certificate with the Secretary of State, showing its principal place of business in this state, . And they asked that their answer be taken and considered as a cross-complaint against the Buffalo Zinc and Copper Company, and that they have judgment for the land.

The defendants, G. J. Crump, B. J. Carney, J. C. South, M. N. Dyer, Z. M. Horton, and W. F. Pace, answered the complaint of the Buffalo Zinc and Copper Company, adopted the answer of Frank, S. J. and Henry Pace as their own, and alleged that, on the twenty-eighth day of December, 1897, they located a mining claim on the lands in controversy, and called it the "White Eagle Placer Mining Location," and thereupon entered, begun and carried thereon mining operations, and expended large sums of money in developing the same, and at all times thereafter have continued in possession and expended money and labor upon the same; and on the sixteenth day of September, 1898, made application to the United States for a patent thereto in the manner and form required by law. And they asked for judgment for the land.

The Buffalo Zinc and Copper Company answered the cross-complaint of Frank, S. J. and Henry Pace, and denied all the allegations therein inconsistent with its complaint.

The court, after hearing the evidence adduced by both parties, found that the defendants were entitled to the possession of the land, and that the plaintiff, Buffalo Zinc and Copper Company, was, in equity, entitled to recover the sum of ten thousand dollars for moneys expended by it in developing said property, but refused to determine whether it was lead or lode or placer ground, and rendered a decree in favor of the defendants for the land, and decreed that the plaintiff have a lien on the same for the ten thousand dollars, provided it assented to and ratified the decree within forty days; and the plaintiff appealed.

534 The following questions are presented by the pleadings and evidence in this case for our consideration and decision: 1. Did appellant, by a failure to comply with the terms of an act entitled "An act to prescribe conditions upon which foreign corporations may do business in this state," approved February 16, 1899, lose its right to maintain this action? 2. Was the mining claim of appellant located upon a lead and lode of mineral? 3. Were the locations of the Bell and White Eagle claims by Rose Ann Kaylor and Francis E. Blake valid? 4. Did appellant abandon or forfeit the Bell and White Eagle lead and lode claims? 5. Did the appellant have the right to amend the Bell and White Eagle claims?

We shall consider these questions in the order stated.

1. Section 1 of the act of February 16, 1899, provides that every foreign corporation, "before it shall be authorized or permitted to transact business in this state, or to continue business therein, if already established, shall, by its certificate under the hand of the president and seal of such company or corporation, filed in the office of the Secretary of State of this state, designate an agent . . . upon whom service of summons and other process may be made," and state its principal place of business in this state. Section 2 provides that every foreign corporation doing business in this state shall file in the office of the Secretary of State of this state a copy of its charter, articles of incorporation or association, or certificate of incorporation. Section 3 provides that any corporation which shall refuse or fail to comply with the act shall be subject to a fine of not less than one thousand dollars, and shall not "maintain any suit or action, either legal or equitable, in any of the courts of this

state, upon any demand, whether arising out of contract or tort"; and section 4 provides that "any foreign corporation that has heretofore engaged in business, or made contracts in this state, may, within ninety days after the passage of this act, file such copy of articles of incorporation, together with certificate of appointment of an agent upon whom service of summons or other legal process may be had, in the office of the Secretary of State, and pay the requisite fees thereon, as provided by this act."

This action was commenced in December, 1898, before the act of February 16th was passed; and the plaintiff, a foreign corporation, ⁵³⁵ filed a copy of its articles of incorporation and a certificate of the appointment of an agent, upon whom service of summons and other legal process may be had, in the office of the Secretary of State on the 18th of August, 1899, during the pendency of the action.

Appellant contends that it was not necessary to file a copy of its articles of incorporation or a certificate of appointment of an agent, in order to maintain this action, because it is not a suit or action upon any demand arising out of a contract or tort. But it is not necessary to decide that question. The act of February 16th does not expressly prohibit the institution of an action because of a failure to perform any condition, nor does it intend to forever prohibit the maintenance of any action because the plaintiff therein is a foreign corporation, and has not within any particular time complied with its terms. Penalties are imposed on account of past conduct or omissions. The penalties of the act in question are, doubtless, intended to compel an observance of its terms. When that is done, its purpose is accomplished, the condition upon which the right to maintain an action depends is performed, and the plaintiff can in the future prosecute it to a final judgment: *Carson Rand Co. v. Sterne*, 129 Mo. 381, 31 S. W. 772.

The institution and prosecution of an action are not doing business within the meaning of the act of February 16, 1899, and of other statutes upon the same subject: *Railway Co. v. Fire Assn.*, 55 Ark. 174, 18 S. W. 43. The appellant complied with the act, and has the right to prosecute its suit until it is finally disposed of in due course of law.

2. Was the mining claim of appellant located upon a lead and lode of mineral?

It is difficult to define what is meant by a lead, lode or vein of mineral matter. The first reported case in which a defini-

tion was attempted is the Eureka Case, 4 Saw. 302, 311, Fed. Cas. No. 4548. The court, after observing that the word was not always used in the same sense in scientific works on geology and mineralogy and by those actually engaged in the working of mines, said: "It is difficult to give any definition of the term, as understood and used in the acts of Congress, which will not be subject to criticism. A fissure in the earth's crust, an opening in its rocks and strata made by some force of nature, in which the mineral is deposited, would seem to be essential to the definition of a lode, in the judgment of geologists. ⁵³⁶ But, to the practical miner, the fissure and its walls are only of importance as indicating the boundaries within which he may look for and reasonably expect to find the ore he seeks. A continuous body of mineralized rock, lying within any other well-defined boundaries on the earth's surface and under it, would equally constitute, in his eyes, a lode. We are of opinion, therefore, that the term, as used in the acts of Congress, is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rocks." The supreme court of the United States in *Iron Silver Min. Co. v. Cheesman*, 116 U. S. 529, 534, 6 Sup. Ct. Rep. 481, 483, followed this citation by observing: "This definition has received repeated commendation in other cases, especially in *Stevens v. Williams*, 1 McCrary, 480, 488, Fed. Cas. No. 13,413, where a shorter definition by Judge Hallett, of the Colorado circuit court, is also approved, to wit: In general, it may be said that a lode or vein is a body of mineral, or mineral body of rock, within defined boundaries, in the general mass of the mountain." And the same court, in the same case, said: "The lode or vein must be continuous in the sense that it can be traced through the surrounding rocks, though slight interruptions of the mineral-bearing rock would not be alone sufficient to destroy the identity of the vein. Nor would a short partial closure of the fissure have that effect if a little farther on it recurred again with mineral-bearing rock within it": *Iron Silver Min. Co. v. Cheesman*, 116 U. S. 538, 6 Sup. Ct. Rep. 485. We accept this interpretation of the acts of Congress as correct.

The validity of the location of the Bell and White Eagle mining claim depend upon the acts of Congress. They are located under these acts, and derive their whole force, strength and support from them. In determining, therefore, whether they were located upon a lode or vein of minerals, we are gov-

erned by the meaning of those terms as used in the statutes of the United States. It can serve no useful purpose to set forth the evidence adduced by the parties upon this issue. It would require too much time and space to do so. It is sufficient to say that, in our opinion, the preponderance of the evidence in the case shows that the claims in question were located upon a lode or vein of minerals, in the sense those terms are used in the laws enacted by Congress; and we so decide.

3. Appellees insist that the locations of the Bell and White ⁵³⁷ Eagle claims as made by Rose Ann Kaylor and Francis E. Blake were invalid. They say that the description of the Bell claim in the notice of location by Kaylor was insufficient. It is as follows: "Beginning at the northwest corner of Ed. Williams, 1-16, at a black oak post; thence 1,500 feet north between sections 10 and 11 to a dogwood bush; thence 600 feet east to a dogwood bush; thence 1,500 feet south to oak post in Williams' field; thence 600 feet to place of beginning. This being in the northwest quarter of the southwest quarter, section 11, township 17, range 15 west." They base their contention upon the fact that there is nothing in the record which shows what is meant by "Ed. Williams, 1-16," named in the notice as the beginning point. But it does show that it was at a black post, and 1,500 feet north of it was a dogwood bush between sections 10 and 11, which must have been on the line between those sections, and that the claim described was in the northwest quarter of the southwest quarter of section 11, township 17, range 15 west, in Marion county, in this state. The presumption is that it (Ed. Williams, 1-16) is a well-known natural object, until the contrary appears: *Hammer v. Garfield Min. etc. Co.*, 130 U. S. 291, 9 Sup. Ct. Rep. 548, 16 Morr. Min. Rep. 125, 132. And nothing is shown to the contrary. The sufficiency of the description is not attacked upon any other ground.

What we have said of the Bell claim is equally true of the White Eagle claim. They further insist that there is no evidence to show that the notices of the location of these claims were posted on them, but the evidence does show that the appellant purchased the Bell and White Eagle claims, and that they were conveyed to it by the vendor, and that it has been in possession controlling and developing them, and holding adversely to all the world, for a time longer than the statutory period of limitation. As against all adverse claimants, the presumption is that the location of the claim of appellant was

regularly made: *Harris v. Equator Min. etc. Co.*, 3 McCrary, 14, 8 Fed. 863, 12 Morr. Min. Rep. 178; *Cheesman v. Hart*, 42 Fed. 99. They say that the notices of the location of these claims were not recorded within thirty days. The record shows that they were recorded before any adverse rights to the same ground were acquired. This is sufficient. No damage was done by the failure, and no one can complain that it was not done at an earlier date: ⁵³⁸ *Faxon v. Barnard*, 2 McCrary, 44, 4 Fed. 702, 9 Morr. Min. Rep. 515; *Preston v. Hunter*, 67 Fed. 996; *McGinnis v. Egbert*, 8 Colo. 41, 5 Pac. 652, 15 Morr. Min. Rep. 329.

Appellees contend that the original locations of the Bell and White Eagle claims were void, because the land covered thereby was not subject to location at the time they were made, *E. C. Bartlett and S. E. Williams* having previously, on the 12th of March, 1885, made mining locations, known as the "Bon Ton" and "Small Hope" claims, on the same land. The evidence indicates that Bartlett and Williams had abandoned their claims when the Bell and White Eagle claims were located. After locating the Bon Ton and Small Hope claims, they never undertook to develop and maintain them. The Bell and White Eagle claimants took possession and held and developed them by work and labor performed, and held adverse possession of the same for a longer time than the period of limitation prescribed by statute. This was sufficient to render their claim valid against everyone except the United States: *Glacier Mt. etc. Min. Co. v. Willis*, 127 U. S. 471, 8 Sup. Ct. Rep. 1214; *Francoeuer v. Newhouse*, 43 Fed. 236; *Four Hundred and Twenty Min. Co. v. Bullion Min. Co.*, 3 Saw. 634, Fed. Cas. No. 4989; *Harris v. Equator Min. etc. Co.*, 3 McCrary, 14, 8 Fed. 863.

4. Did appellant abandon or forfeit the Bell and White Eagle lead and lode claims?

Appellees alleged that appellant made a placer location upon one hundred and sixty acres, including the ground upon which the Bell and White Eagle lead and lode claims were located, and thereby abandoned the latter. But this was disproved by the evidence. *W. Q. Seawell*, as agent, undertook to make such a location, but did so without authority, and appellant refused to ratify it.

The next contention is that appellant abandoned the Bell and White Eagle mining claims by quitting work upon them and closing them up, and causing August Schmidt to enter the land

embraced by the same, together with other lands amounting in the aggregate to one hundred and sixty acres, as a homestead. An abandonment is a voluntary act, and consists of the relinquishment of possession of the claim with an intention not to return and occupy it. It is purely a question of intention. "If there is no animus revertendi, the desertion of the claim determines the property at once, without regard to the duration of the locator's absence." To constitute an abandonment, there must be an absolute desertion of the premises.⁵³⁹ The burden of proving it is upon him who asserts it: 2 Lindley on Mines, sec. 643. In this case the appellant quit work upon its claims temporarily, except annual assessment work, on account of the lack of transportation for the ores taken from the mines. August Schmidt entered the land as a homestead, but without the consent of appellant. There was no agreement or understanding that he would hold the land for its benefit. The evidence is insufficient to prove that it did or intended to relinquish its claims.

Appellees allege that appellant forfeited the Bell and White Eagle mining claims by the failure to perform the annual labor required by law. Section 2324 of the Revised Statutes of the United States provides, among other things, as follows: "On each [mining] claim located after the 10th of May, 1872, and until patent has issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. But where such claims are held in common, such expenditures may be made upon any one claim; and, upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made; provided, that the original locators, their heirs, assigns or legal representatives, have not resumed work upon the claim after failure and before such location." Under this statute, if an original locator, his heirs or assigns, should fail to perform work in any year, and should thereafter resume work in good faith before any location is made, he thereby preserves his right to the claim. His rights then stand as they would if there had been no failure to comply with this condition of the law; and no one has a right to relocate upon the land covered by his claim after such resumption of work in good faith: *Belk v. Meagher*, 104 U. S. 279; *North Noonday Min. Co. v. Orient Min. Co.*, 1 Fed. 522, 536.

As said in *Belk v. Meagher*, 104 U. S. 284: "Mining claims are not open to relocation until the rights of a former locator have come to an end. . . . The right of location upon the mineral lands of the United States is a privilege granted by Congress, but it can only be exercised within the limits prescribed by the grant. A location can only be made where the law allows it to be done. Any attempt to go beyond that will be of no avail. Hence a relocation on lands actually covered at the time by another valid and subsisting location is void; and this not only against the prior ⁵⁴⁰ locator, but the whole world, because the law allows no such thing to be done."

A forfeiture of a mining claim by the failure of the former owner to perform the annual labor required by law cannot be established except by clear and convincing evidence. The burden of proving it rests upon him who sets it up—in this case upon the appellees: *Hammer v. Garfield Min. etc. Co.*, 130 U. S. 291, 301, 9 Sup. Ct. Rep. 548.

The grantors of appellant located their mining claims, the Bell and White Eagle, in the year 1886. They and appellant held and controlled the same until 1897 and 1898, when appellees undertook to locate claims upon the same and other lands and to take possession thereof. Saying nothing of the work done by appellant in previous years, we think the evidence satisfactorily shows that it in good faith annually performed the work required by the statutes of the United States in the years 1895, 1896, 1897 and 1898, and until the commencement of this suit. The attempted location of appellees was therefore void, and the effort to take possession was a trespass.

5. Appellant amended the location of its Bell and White Eagle mining claims. Appellees insist in this court that the amendment was not made in the manner prescribed by law. But that was not in issue in the trial court. Appellant alleged in its complaint as follows: "Plaintiff further states that on the nineteenth day of May, 1898, plaintiff, being the owner of, and in possession of, all that part of said White Eagle and Bell mining claims that was not embraced in the homestead of August Schmidt as corrected by the Secretary of the Interior, made a corrected location of said mining claims, so as to conform to the lead or lode of mineral; and embraced said lands in one claim, containing about seventeen and sixty one-hundredths acres, and named the White Eagle Lead and Lode Mining Claim, and situated and embracing most of the south half of

the northwest quarter of section 11, township 17 north, of range 15 west. That said amended location was made in conformity to the laws of the United States, the laws of the state of Arkansas, and the laws and usages of the Rush Creek mining district, where said mining claim is located. That said location notice was duly recorded in the office of the Rush Creek mining district on the ninth day of May, 1898, in record book K, on pages 44 and 45." And appellees answered as follows: "They deny that plaintiff, ⁵⁴¹ Buffalo Zinc and Copper Company, had any right or authority to make the said pretended change and correction of what it claims to be its lode or lead mineral claim. . . . They aver that, as alleged in their original complaint filed herein, which said complaint is here referred to and asked to be taken and considered in connection with this pleading, that long before said pretended change of survey by said plaintiff, Buffalo Zinc and Copper Company, these plaintiffs [defendants] had, in manner and form required by law, peaceably entered upon and made August Placer Mineral Location, covering all the land involved in this controversy and all the lands mentioned and described in these plaintiffs' [defendants'] original complaint, and was holding the same at the time the said plaintiff, Buffalo Zinc and Copper Company, entered thereon for the purpose of making said pretended change in what they claimed to be their lead and lode, and aver that said entry by said plaintiff, Buffalo Zinc and Copper Company, was without right or authority of law, and that such entry was a trespass on the rights of these plaintiffs [defendants]." The complaint and answer show that the legality and sufficiency of the amendment of the location were not questioned, except the right of appellant to enter upon the land for the purpose of making the same, and that, we have seen, it could lawfully do. It was unnecessary to prove or show that which was, expressly or impliedly, admitted by all the parties. It follows that the mining claims of the appellees, so far as they conflict with that of appellant, as amended, should have been canceled by the trial court.

It is therefore ordered that the decree appealed from be reversed, and that this cause be remanded with instructions to the court to enter a decree in accordance with this opinion.

Mining.—A *Vein*, within the meaning of the mining law, is a continuous body of mineral-bearing rock in place in the general mass of surrounding formation; and while it must have boundaries, it is not necessary that they be seen, but their existence may be other-

wise determined: *Beals v. Cone*, 27 Colo. 473, 33 Am. St. Rep. 92, 63 Pac. 948. Its continuity may be interrupted, even to a closure of the fissure, without destroying its identity. By continuity is meant such mineral or geological connection as would enable a person to follow the vein along its dip, and through the obstructions, interruptions, and breaks that may occur therein: *Butte etc. Min. Co. v. Societe Anonyme etc.*, 23 Mont. 177, 75 Am. St. Rep. 505, 58 Pac. 111.

The Abandonment of a Mining Claim is a question of intention. It rests upon the intent to abandon, and the acts accompanying the intention: See the monographic note to *McKay v. McDougall*, 87 Am. St. Rep. 403-405.

The Forfeiture of a Mining Claim involves no question of intention; it takes place by operation of law when the required expenditure is not made on the claim. But although the expenditure is not made within the prescribed time, the locator's rights may be saved by a resumption of work before third persons have made a relocation: See the monographic note to *McKay v. McDougall*, 87 Am. St. Rep. 405-416.

FORT SMITH v. SCRUGGS.

[70 Ark. 549, 69 S. W. 679.]

TAXATION, DOUBLE—What is Not.—A statute requiring persons keeping and using wheeled vehicles in a city to pay a tax for that privilege, such tax, when collected, to be appropriated exclusively for repairing and improving streets, does not authorize double taxation, though such property is also assessed in proportion to its value, and a tax levied thereon. The tax thus authorized to be imposed by the city is in the nature of a toll for the use of its improved streets. (p. 102.)

MUNICIPAL CORPORATIONS—Tax for Privilege of Using Streets of.—The legislature may authorize a municipal corporation to impose a tax on the privilege of driving vehicles upon its public streets. (p. 105.)

MUNICIPAL CORPORATIONS—Tax for Using Streets—Whether may be Exacted of Residents Only.—The legislature may authorize the imposing by a municipal corporation upon its residents of a tax for keeping and using a vehicle on its streets, because, as a class, residents use such streets more than nonresidents. (p. 105.)

MUNICIPAL ORDINANCES Void in Part Only.—If a municipal ordinance requires the payment of a tax to be in gold, silver, or United States currency, when such payment should have been authorized to be made in municipal warrants, or makes unlawful discrimination between persons, these unauthorized provisions of the ordinance may be disregarded and the balance enforced. (p. 106.)

Prosecution of the defendant, a resident of Fort Smith, for keeping a one-horse buggy for pleasure driving and a one-horse delivery wagon for business purposes, without paying

a tax or license fee as required by a municipal ordinance, declaring it to be unlawful for any person of the city to keep and use any wheeled vehicle without first obtaining a license therefor. The ordinance designated the amount of license fee to be paid, required payment to be made in gold, silver, or United States currency, and directed the proceeds to go into a fund to be used for repairing and improving the streets, and declared that violations of the ordinance were punishable as misdemeanors. The trial court decided that the statute referred to in the opinion of the appellate court and under which the ordinance was sought to be sustained was unconstitutional, and the city appealed.

F. M. Jamieson, for the appellant.

Mechem & Bryant, for the appellee.

553 RIDDICK, J. This is an appeal from a judgment rendered in a case where a resident of the city of Fort Smith was prosecuted for keeping and using a wheeled vehicle in that city without having a license therefor. The question in the case relates to the validity of the city ordinance which imposes a license tax upon residents of the city for the privilege of keeping and using wheeled vehicles upon the streets of the city. Our statute on that subject is as follows, to wit: "Cities of the first class are hereby authorized to require residents of such city to pay a tax for the privilege of keeping and using wheeled vehicles, except bicycles, but such tax shall be appropriated and used exclusively for repairing and improving the streets of such city": Acts of 1901, p. 113.

There can be no doubt that the language of this act is broad enough to authorize an ordinance taxing residents of the city for the privilege of keeping and using wheeled vehicles upon the streets of the city. If the act is valid, it follows that the ordinance, if properly passed, is valid unless void because it goes beyond the 553 authority conferred by the statute. It is admitted that the ordinance was properly passed, and the most important question raised by the appeal relates to the validity of the statute upon which the ordinance is based.

The first objection urged against the statute is that it attempts to authorize double taxation. It is said that, as the defendant had already paid the general state and city taxes on his buggy and wagon, the attempt to make him pay a license fee for the privilege of using them is really an attempt to

levy an additional tax upon his wagon and buggy. Counsel say that a tax on the use of an article is a tax on the article itself. While this may be true of a piano, bedstead, or cooking stove, the use of which involves no injury or detriment to the public or its property, as to wheeled vehicles it is different, for they are made to be used upon roads and streets. The streets belong to the public, and are under the control of the legislature, whose province it is to enact laws for their improvement and repair. The chief necessity for keeping improved streets is that they may be used for the passage of wheeled vehicles; and the wear of the streets caused by the passage of such vehicles over them makes necessary constant and expensive repairs. For this reason, no doubt, the legislature considered it to be equitable and just that owners of such vehicles should, in addition to the general tax upon their property, pay something for the privilege of using the streets as driveways, the amount paid to go toward keeping the streets in good repair. This is what the legislature attempted to do.

The act, we think, plainly shows that there was no intention to authorize a tax upon vehicles or other property. It authorizes only a tax upon the privilege of keeping and using vehicles upon the streets of the city, and it requires that this tax shall be used exclusively for repairing and improving the streets of the city. A resident of the city may keep and use at his place in the country as many vehicles as he pleases, but he is subject to no tax, under this statute, unless he uses them on the streets of the city. He can keep and use vehicles anywhere in the world, except on the streets of the city of his residence, and he is not liable to the tax. The license fee imposed is, then, not a tax upon property, but is in the nature of a toll for the use of the improved streets. In other words, it is the privilege of using vehicles on the improved streets, and not the vehicle itself, that is taxed. We are, therefore, ⁵⁵⁴ of the opinion that the statute is not subject to the criticism that it authorizes double taxation, and the contention of the defendant on that point must be overruled. Having reached the conclusion that this ordinance does not attempt to tax property but to tax a privilege, it follows that the provisions of our constitution requiring that all property "shall be taxed according to its value," and in such manner as to make the same equal and uniform throughout the state, do not apply, for they refer to taxes upon property only: Little

Rock v. Prather, 46 Ark. 479; Baker v. State, 44 Ark. 134; Washington v. State, 13 Ark. 752.

The next question presented is whether the legislature has the power to authorize cities to impose a tax upon the privilege of driving vehicles upon the public streets. The contention on this point is that a resident of a city has a right to drive upon the public streets, and that the right to do so is not a privilege that can be taxed. It is no doubt true that the city could not impose a tax upon the privilege of using the streets for driving vehicles upon them without legislative permission to do so. The right to drive on the public streets could not be treated as a privilege but for the act of the legislature making it one. But the streets belong to the public, and are under the control of the legislature: Elliott on Streets and Roads, 2d ed., sec. 21. It is within the power of the legislature not only to make needful regulations concerning the use of the public roads and streets, but also to provide means by which they may be improved and kept in repair. In order to effect that purpose, the legislature has, in effect, declared the use of the streets by wheeled vehicles to be a privilege, and has authorized the city to tax the privilege. We know of no limitation on the power of the legislature that prevents it from passing such an act, and thus authorizing the imposition of a reasonable tax for that purpose. "Everything," says Judge Cooley, "to which the legislative power extends may be the subject of taxation, whether it be person or property, or possession, franchise, or privilege, or occupation, or right. Nothing but express constitutional limitation upon legislative authority can exclude anything to which the authority extends from the grasp of the taxing power, if the legislature in its discretion shall at any time select it for revenue purposes": Cooley on Taxation, 2d ed., 5. Again, he says: "The power to impose taxes is one so unlimited in force and so searching in extent that ⁵⁵⁵ the courts scarcely venture to declare that it is subject to any restrictions whatever, except such as rest in the discretion of the authority which exercises it. It reaches to every trade or occupation; to every object of industry, use, or enjoyment; to every species of possession; and it imposes a burden which, in case of failure to discharge it, may be followed by seizure and sale or confiscation of property": Cooley's Constitutional Limitations, 6th ed., 587. These statements of the law by the learned author are well supported by decisions of our highest courts: McCulloch v. Maryland, 4

Wheat. 316, 418; *Kirtland v. Hotchkiss*, 100 U. S. 491; *Youngblood v. Sexton*, 32 Mich. 406, 20 Am. Rep. 654.

The subject matter of this statute comes, we think, within the general law-making power of the legislature, and, if there be any limitation forbidding the exercise of such power in that respect, it must be found in the constitution. But there is none. Our constitution specially provides that the legislature shall have power to tax privileges in such manner as may be deemed proper. It also authorizes the legislature to delegate the taxing power to towns and cities of the state to the extent necessary for their "existence, maintenance and well-being": Const. 1874, art. 2, sec. 23; also art. 16, sec. 5. And it has been established by the decisions of this court that the legislature may delegate to towns and cities the power to tax occupations: *Little Rock v. Prather*, 46 Ark. 479.

If, notwithstanding the fact that a merchant has paid taxes on all his property, including his stock of goods, the state may yet authorize the city to compel him to pay an additional tax for the privilege of carrying on his business, why may not the state authorize the city to collect a reasonable tax in the nature of a toll for the use of its streets? It would seem that the tax for the use of the streets is more equitable and just than the occupation tax. The goods of the merchant are in his own store. In pursuing his business he is not infringing upon the rights or injuring the property of either the public or its citizens. But the use of the public streets by driving vehicles upon them does wear them, and in the end calls for repairs and additional outlay on the part of the public. The improvement of the streets confers upon the class taxed—that is to say, upon those who keep and use vehicles—a special benefit, so that it is right that they should pay a greater proportion of the taxes required to keep them in repair than those ~~use~~ who do not use the streets in that way. In other words, to quote the language of a Missouri court, it is just and proper that "those who mainly wear out the streets should mainly pay for keeping them in repair": *City of St. Louis v. Green*, 7 Mo. App. 477.

We are therefore inclined to the opinion that this is a just and equitable statute. But whatever may be our views about the expediency of the act, it must be sustained on the ground that it comes within the sovereign powers of the legislature, and because we find nothing in the constitution that forbids the exercise of such power. Similar statutes have been sus-

tained in other states: *City of St. Louis v. Green*, 7 Mo. App. 474; *City of St. Louis v. Green*, 70 Mo. 562; *Mason v. Cumberland*, 92 Md. 451, 48 Atl. 136; *Tomlinson v. City of Indianapolis*, 144 Ind. 142, 43 N. E. 9; *Frommer v. Richmond*, 31 Gratt. (Va.) 646, 31 Am. Rep. 746. See, also, *Little Rock v. Prather*, 46 Ark. 479. But it is said that, conceding that the legislature had the power to permit cities to levy a toll for the use of the streets, it should be imposed equally upon all who use the streets, and that this act is void for the reason that it discriminates in favor of those who dwell outside of the city, and permits the tax to be levied upon residents only.

It is doubtless true that the legislature could not arbitrarily select certain citizens upon whom to impose the tax, while exempting others in like situation. But the rule of equality only requires that the tax shall be collected impartially of all persons in similar circumstances; and this statute applies equally to all persons of the class taxed. As a class, residents of the city use the streets more, and are more benefited by having them kept in good repair, than those who do not live in the city. It is true that nonresidents of the city also use the streets with their wagons and other vehicles, and it may be true that certain of them use the streets as much or more than certain of the residents of the city, but, as a class, they do not use the streets as much as residents of the city, and this furnishes a reasonable basis for the distinction made in the act between the two classes. The requirement of the statute that the tax must be imposed on residents of the city only is but an adoption by the legislature of the common policy of making each community keep up its own highways. This does not discriminate unjustly in favor of those who live beyond the city limits, for they have to keep other highways which the people of the city may in turn use free of charge. For this reason we think that ⁵⁵⁷ it was within the discretionary powers of the legislature to make this distinction, and that it does not invalidate the act. After a full consideration of the questions presented, we are of the opinion that the enactment of this statute was a valid exercise of legislative power. With the wisdom or expediency of it, as before stated, we have nothing to do. If it should prove to be unsatisfactory, there is still a remedy. The legislature can repeal the statute, or the city council may repeal the ordinance, but the courts cannot do so.

Having reached the conclusion that the statute is valid upon which the ordinance is based, there remains for consideration certain objections to the ordinance which it is contended are not authorized by the statute. First, it is said that the ordinance is invalid because it requires the payment of the license tax in gold and silver or United States currency. Now, this license tax is for a special purpose, and the law requires that the proceeds thereof shall be used for the repair and improvement of the streets exclusively. For this reason there may be room for doubt as to whether it could be paid by warrants of the city drawn on the general fund. But if this provision of the ordinance was void, it would not annul the whole ordinance. If it be invalid, it can be disregarded. Conceding that this provision of the ordinance requiring the tax to be paid in gold, silver or currency to be void, defendant should have tendered the warrants if he desired to make the payment with city warrants, and demanded a license. He is prosecuted for keeping and using a vehicle in the city without having a license therefor. He had no license, and had made no offer of money or scrip to procure one. We therefore think the defense made on this point is not tenable.

The same thing may be said of the provision making a distinction in rates in favor of persons keeping and using more than five buggies. If we strike out that portion of the ordinance, the material portion of it stands, and this case would not be affected. For this reason it is not necessary to determine those questions in this case. It is not claimed that the amount of the license fee imposed by the ordinance is unreasonable, and it follows from what we have said that in our opinion the circuit court erred in its declaration of law, and in its judgment discharging the defendant. The judgment is therefore reversed, and the cause remanded for a new trial.

A City has no Power to Impose a License Fee by way of a tax on every person using wheeled vehicles on its streets for their individual use. An ordinance providing that money received from such license fees shall be expended in improving the public streets, creates a double tax and is void, when such vehicles are taxed at their value, for general purposes: Chicago v. Collins, 175 Ill. 445, 67 Am. St. Rep. 224, 51 N. E. 907.

CASES
IN THE
APPELLATE COURT
OF
INDIANA.

DE RUITER v. DE RUITER.

[28 Ind. App. 9, 62 N. E. 100.]

A PLEADING Must be Construed most strongly against the pleader, and specific averments therein must be given precedence over general. (p. 110.)

EXECUTION—Property Subject to.—Money, Whether Secreted or Deposited in Bank, is not subject to levy under execution. (p. 110.)

PLEADING—One Averment, When not Sufficient to Overcome Another.—If a pleading states that the defendant, at the time of making a conveyance, was largely indebted, and has since become, and now is, insolvent, and that he had not at the time of making such conveyance, nor has he now, sufficient property subject to execution to pay his debts and plaintiff's claim for alimony, and that he is possessed of a large amount of money and bonds which he secreta, this latter allegation is so indefinite and uncertain that it cannot be regarded as contradicting the essential averments preceding it. (p. 111.)

A CREDITOR IS ONE who has a right to demand and recover of another a sum of money on any account whatever. (p. 114.)

FRAUDULENT TRANSFERS—Who may Attack as a Creditor. A Wife is a present and continuous debtor of her husband, and as such is within the protection of the statute against fraudulent conveyances, and may proceed to obtain relief against such a conveyance if it interferes with her right to collect maintenance and alimony. (p. 114.)

FRAUDULENT TRANSFERS—Judgment for Alimony.—A wife who has obtained a judgment for alimony is a creditor of her husband, and as such entitled to attack a fraudulent and voluntary transfer made by him. (p. 114.)

FRAUD MAY BE INFERRED From Established Facts, and need not be proved by positive evidence. (p. 115.)

FRAUDULENT TRANSFERS—Relief Against.—Where a wife has obtained a decree divorcing her from her husband, awarding alimony, and declaring a conveyance made by him to be fraudulent and void as against her, the court may also direct a sale of the prop-

erty so conveyed, and the application of the proceeds to the payment of the amount due her. (p. 117.)

DIVORCE—Attorneys' Fees.—Under a statute making it the duty of the trial court in decreeing divorce to a wife to require the husband to pay her reasonable expenses in the prosecution of her suit, an allowance may be made in her favor for attorneys' fees. (p. 117.)

DIVORCE.—Alimony to an Innocent and Injured Wife Should be in a Proportion to leave her at least as well off pecuniarily on noncohabitation as she would if cohabiting. An appellate court will not interfere with the decree of a trial court in allowing alimony unless an abuse of discretion is manifest. (p. 118.)

DIVORCE—Attorneys' Fees.—The Fact that a Wife has Property of Her Own does not prove that an allowance of attorneys' fees to her in a decree divorcing her from her husband is improper or unreasonable. (p. 118.)

HUSBAND AND WIFE—Confidential Relations of.—A wife has a right to rely upon confidential relations existing between her and her husband, and is, therefore, excused in not reading papers presented to her by him, to ascertain whether his representations respecting their nature and purpose are true, and if such representations were false, she is not precluded from obtaining relief in equity by the fact that she executed the papers without ascertaining that their contents were not as so represented. (p. 119.)

Suit by Laura De Ruiter against her husband for divorce and alimony and to set aside a transfer of real estate. Judgment for the plaintiff; defendant appealed.

R. O. Hawkins and H. E. Smith, for the appellants.

W. H. Harding and A. R. Hovey, for the appellee.

10 WILEY, J. Appellee was plaintiff below, and prosecuted her action against the appellant Derk De Ruiter for divorce, and to recover alimony. Appellants Vanderwerf and Vanderwerf are husband and wife, and were made parties for the reason that it was charged in the amended complaint that appellant De Ruiter had conveyed to appellant Eva G. Vanderwerf, who was his daughter, all his real estate, and that the purpose of said conveyance was to defraud appellee, etc. It was therefore sought, not only to procure a decree of divorce and secure alimony in favor of appellee, but also to set aside such conveyance as fraudulent. The ¹¹ amended complaint is in one paragraph, and the ground for divorce relied upon rests upon cruel and inhuman treatment. A supplemental complaint was filed, charging abandonment, but the record shows that the finding and decree rest upon the amended complaint, and no question is presented for decision arising under the supplemental complaint. The appellants each answered by denial. The court found for the appellee that she was

entitled to a divorce; also that she was entitled to four thousand dollars alimony, and five hundred dollars for her attorney's fees. The court also found against all the appellants, that the conveyance of real estate to appellant Eva G. Vanderwerf, as described in the complaint, was fraudulent and void, and should be set aside, and that said real estate be subjected to the payment of the alimony allowed appellee, the attorneys' fees and costs. Judgment followed in harmony with the finding. Appellant Eva G. Vanderwerf moved separately to modify the judgment, by striking out and eliminating therefrom all that part of it affecting the real estate which her coappellant had caused to be conveyed to her. Appellant De Ruiter also moved to modify the judgment in certain specified particulars. Each of these motions was overruled, and the motions and the rulings thereon are brought into the record by bill of exceptions. Appellants Derk De Ruiter and Eva G. Vanderwerf each filed separate motions for a new trial, which were respectively overruled. Neither of appellants demurred to the amended complaint.

By his separate assignment of error, appellant De Ruiter attacks, for the first time, the sufficiency of the amended complaint, and brings in review the action of the court in overruling, respectively, his motion to modify the judgment and for a new trial. The assignment of errors of appellants Vanderwerf and Vanderwerf is joint and is as follows: 1. The amended complaint does not state facts sufficient to constitute a cause of action against them; 2. That "the court erred in overruling the appellant Eva G. Vanderwerf's ¹² motion to modify and correct the decree and judgment"; 3. That "the court erred in overruling the appellant Eva G. Vanderwerf's motion for a new trial."

Counsel for appellant have not discussed the assignment of errors in their order, but have taken up the overruling of the motions to modify, and for a new trial, in the order stated. If the amended complaint does not state a cause of action against either of the appellants, as counsel assert, it seems to us that that question should be first disposed of, for if it does not, it would be wholly unnecessary to decide the remaining questions.

No argument is directed against the complaint on the ground that it does not state sufficient facts to constitute a cause of action against appellant De Ruiter for divorce, but that it does not state facts sufficient to warrant the setting aside of the conveyances of real estate to appellant Eva G. Vanderwerf as fraudulent. The objection urged to the complaint is that

at the time of the conveyances it is not alleged that appellant De Ruiter was insolvent, and also that he was insolvent when the present action was commenced. The averments of the complaint upon this point are brief, and we quote them in full, viz.: "That said Derk De Ruiter was on the date last aforesaid [referring to the date of the conveyance] largely indebted to various persons in various sums, and since has become and is now insolvent, and at the time said conveyances were made he had not, nor has he since had, nor has he now, sufficient other property, subject to execution, to pay his debts, or any judgment that may be rendered plaintiff for alimony herein, or any part hereof. That plaintiff is informed that defendant Derk De Ruiter is possessed of a large amount of money and bonds which he secretes, but she is unable to give the particular facts in relation thereto." If we are to regard this latter averment equivalent to an averment that appellant De Ruiter, at the time this action was commenced, was possessed of a "large sum of money and bonds," etc., then ¹³ the two averments are in irreconcilable conflict, and, this being true, the pleading must be construed most strongly against the pleader, and the latter averment, being specific, must control the former, which is general: *Ivens v. Cincinnati etc. R. R. Co.*, 103 Ind. 27, 2 N. E. 134; *Houck v. Graham*, 106 Ind. 195, 55 Am. Rep. 727, 6 N. E. 594; *City of Wabash v. Carver*, 129 Ind. 552, 29 N. E. 25. Such a construction would leave the complaint without the essential averments that at the time of the conveyance, ever since, and when the action to set it aside was commenced, De Ruiter was insolvent, etc. A person possessed of a large amount of money and bonds can hardly be said to be insolvent.

The statement in the complaint, that he was possessed of a large sum of money and bonds, is somewhat indefinite, and is modified by the further statement that such money and bonds are secreted. If the money was in a bank, it was not subject to execution, and if either the money or bonds were secreted they could not be levied upon. The point is that the party who is charged with having fraudulently conveyed his property did not retain sufficient property, and did not have, at the time the action is commenced to set it aside, sufficient property, subject to execution, to pay his debts, etc. So, money, whether it be secreted or deposited in bank, is not subject to levy and execution: See *McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655; *Scott v. Smith*, 2 Kan. 438; *Moorman v.*

Quick, 20 Ind. 67; Carroll v. Cone, 40 Barb. 220. We are inclined to the view that the allegation in the complaint that appellant De Ruiter had a large amount of money and bonds is so indefinite and uncertain that it cannot be regarded as contradicting the essential averments just preceding it, and hence the complaint upon this point must be held good as against an original attack in this court.

Before taking up for decision the questions raised by the motions to modify and for a new trial, it is important to give a brief history of the case as disclosed by the record. August 15, 1896, appellee instituted a suit in the Marion superior ¹⁴ court against appellant De Ruiter, to obtain a divorce and for alimony. To this action he appeared and filed a cross-complaint. That said cause was finally determined January 11, 1897, by a finding and judgment against appellee on her complaint, and against appellant on his cross-complaint. Appellee, at the time of her marriage, was the owner of some real estate of the value of about two thousand five hundred dollars, upon which there was some encumbrance. Appellant De Ruiter owned in his own name real estate, the value of which, above the encumbrance, was over twenty thousand dollars. Appellee also owned some personal property—stock in a building association—of the value of four hundred dollars or five hundred dollars. After the first action for divorce was commenced the two parties lived separate and apart. Some time in February, 1897, after the termination of the former suit, appellant went to appellee's home and made overtures for a reconciliation, and visited her occasionally thereafter. It is the theory of appellee that appellant De Ruiter, in making such overtures for reconciliation, was not acting in good faith, but that he thereby intended to deceive her, for the purpose of getting her to deed to him her real estate, and to get her to join him in conveying his real estate. Also that appellant De Ruiter and appellant Eva G. Vanderwerf entered into a conspiracy, by which she was induced by deceit and misrepresentation to execute to one Trussler a power of attorney, authorizing him to execute and deliver deeds for her husband and herself to any and all of his real estate, and that in furtherance of said conspiracy, all of the real estate owned by De Ruiter was conveyed to Eva G. Vanderwerf by said Trussler as attorney in fact, and that though said real estate was of the value of over twenty thousand dollars, the same was conveyed to said Eva G. for an expressed consideration of four dollars. It is

charged in the complaint, and there is evidence to support it, that appellant De Ruiter procured appellee to convey to appellant Vanderwerf her real estate, and that such conveyance was procured to cheat and defraud her out of it. Appellee owned stock in a ¹⁵ building and loan association, and it was charged that by fraud and misrepresentation he procured such stock to be transferred to him, for the purpose of defrauding her out of it. There is some evidence to sustain this allegation. It was charged, as above stated, that appellants entered into a conspiracy, for the purpose of procuring appellee to join in a conveyance of all of her husbands' real estate, for the purpose of cheating and defrauding her out of her interest in the same. There is no direct or positive evidence in support of this fact, but there are circumstances and conditions disclosed by the evidence which strongly tend to support it. Mrs. Vanderwerf was De Ruiter's daughter. She was married, and after the De Ruiter's separated, the appellant De Ruiter lived with his daughter.

There is no reasonable explanation given for the conveyance of De Ruiter's real estate to his daughter. The whole transaction resulting in such transfer is inconsistent with his obligation and duties to appellee as his wife. It is unnecessary to recite in this opinion even a resume of the many acts and the conduct of appellant De Ruiter, of which appellee complains, and upon which she relies to establish the averments of her complaint, charging cruel and inhuman treatment. It is sufficient to say that the record discloses sufficient facts to warrant the trial court in its conclusion, adjudging that appellee was entitled to a divorce. In fact, this proposition is not seriously controverted. There is evidence to support the fact that appellant De Ruiter proposed to appellee to purchase her real estate for two thousand five hundred dollars, on credit, to pay her six per cent interest on the purchase money, and secure her in its payment. Also, that when she made the deed she believed she was conveying it to him, when in fact the conveyance was made to his daughter.

Before appellee executed the power of attorney above referred to, there is evidence from which the court could have found that the only conveyance the De Ruiter's had talked about before going to the scrivener to execute the papers ¹⁶ was a conveyance to a Mrs. Smith of real estate owned by appellee, and also the conveyance to appellant De Ruiter of real estate owned by her. The evidence fairly shows that when the

parties went to the scrivener appellee executed three papers, under the advice and direction of her husband, two of which De Ruiter represented to her were deeds, and the third was a release. So far as the record shows, appellee did not know she signed a power of attorney, and she did not authorize anyone to deliver it to the attorney in fact, named therein, and that as soon as she learned that she had, she revoked it.

By the motion of Derk De Ruiter to modify the judgment and decree, he sought to have stricken out absolutely the following: 1. That part which declares that appellants had oral notice of the appellee's petition for an allowance; 2. To have the amount of alimony reduced from four thousand dollars to one thousand dollars, for the reason that it was excessive; 3. To have the amount allowed appellee as attorneys' fees reduced from five hundred dollars to two hundred and fifty dollars; 4. To have stricken out and eliminated from the judgment and decree all that part that adjudged that the conveyance of real estate by him to his coappellant, Eva G. Vanderwerf, was fraudulent as against appellee, and that said conveyance was made with the fraudulent intent, etc., and also to eliminate that part which subjects said real estate to sale to satisfy the judgment for alimony and the allowance for attorneys' fees.

The motion of appellant Eva G. Vanderwerf to modify the judgment was: 1. By striking out that part which finds and adjudges that the conveyance to her of the real estate described was fraudulent; that said conveyance was made to and accepted by her with the fraudulent intent to cheat, hinder, and defraud appellee; 2. By striking out that part which adjudges and decrees that said conveyance was fraudulent as against appellee as a "special" creditor of Derk De Ruiter, and subjects said real estate to sale, etc.; 3. By striking out that part relating to an allowance for ¹⁷ attorneys' fees, on the ground that the court had no power, under the issues, to subject the real estate to the payment of said allowance; 4. By striking out that part directing that all of the real estate so conveyed to her, or so much thereof as may be necessary, be subjected to sale, to satisfy said judgment for alimony, etc. These two motions of appellants may properly be considered together.

It is first urged that appellee was not entitled to have the conveyance set aside, because she has not shown that she was a creditor of the grantor. Counsel refer to the rule that, to constitute a fraudulent conveyance, there must be: 1. A credi-

tor to be defrauded; 2. A debtor intending to defraud; and 3. A conveyance of property out of which the creditor could have realized: 8 Am. & Eng. Ency. of Law, 749. It must be conceded that if appellee was not a creditor in any legal sense, she has no debt to enforce, and hence the conveyance would not be fraudulent as to her.

We are told in Anderson's Law Dictionary that a creditor is one "who has a right by law to demand and recover of another a sum of money on any account whatever." In *Bishop v. Redmond*, 83 Ind. 157, a creditor is defined as "one having a legal right to damages, capable of enforcement by judicial process." Appellants concede that there are two kinds of creditors, viz.: 1. Actual creditors, or holders of claims; and 2. Subsequent creditors, or holders of equities which afterward ripen into claims. So if appellee comes within either class she must be regarded as a creditor.

That a wife has equities in her husband's real estate is no longer debatable. That such equities may subsequently ripen into legal, subsisting claims, there can be no doubt. A wife, in our judgment, is a present and continuous creditor of her husband. This necessarily must be, from the marital relations. She is presently and continuously dependent upon him. His first and highest obligation is to provide and care for her. He cannot alienate her inchoate ¹⁸ interest in his real estate without her consent, and against her refusal to join in a conveyance of it. *Nelson on Divorce and Separation*, at section 938, lays down the following rule: "The wife as a special creditor of the husband is within the protection of the statute against fraudulent conveyances and may proceed according to its provisions. On a proper showing of the fraud, the conveyance will be set aside and the property of the husband will be declared subject to the decree for maintenance or alimony," etc. The author cites a great number of American authorities which amply support the text. The case of *Bishop v. Redmond*, 83 Ind. 157, is strongly in point. It was there urged that the complaint was bad because it did not show that appellee was an existing creditor. The court said: "If, then, we should adopt the appellant's theory, and construe the complaint as showing that when the conveyance was made the appellee was not a creditor, but subsequently became one, we should be bound to sustain the pleading. That she was a subsequent creditor, would be true even if there were no other elements in the case than her claim to alimony. A wife who holds a claim to alimony is a creditor": Citing

Frakes v. Brown, 2 Blackf. 295; *Fiegley v. Fiegley*, 7 Md. 537; *Boils v. Boils*, 1 Cold. (Tenn.) 284. In *Plunkett v. Plunkett*, 114 Ind. 484, 16 N. E. 612, 17 N. E. 562, it is held that a wife who has obtained a judgment for alimony is a subsequent creditor of her husband, within the legal meaning of that term. Our conclusion is that appellee was a creditor, and hence was entitled to attack the conveyance by her husband to his daughter, as fraudulent and void. It is next urged that even if appellee was a creditor, she cannot recover in this action, for two reasons: 1. Because De Ruiter could not have made the conveyance with intent to defraud her before the final entry in the first divorce proceeding; and 2. Because the question of fraudulent intent is a question of fact to be established by proof, as other questions of fact, and that there is no proof of intent.

¹⁹ We think the first reason suggested by counsel is wholly untenable, and is substantially answered by the preceding discussion. When this conveyance was made, the first divorce suit had been tried, and the court had announced its finding. Subsequently, judgment followed in harmony with that finding. By that finding and judgment, appellant and appellee remained as husband and wife, with the mutual obligations of the marital relations. The courts were open to each of them for subsequent proceedings for legal separation. If the authorities we have cited declare a correct rule, and we are clear that they do, appellee was such a creditor of her husband as to entitle her to enforce her subsequently acquired rights.

The second reason suggested is answered by the record. If it be conceded that there is no direct proof of fraudulent intent, it does not necessarily follow that such intent was not established. It is a recognized rule that it is not necessary, in order to establish fraud, that direct, affirmative proof of fraud be given, but that fraud may be inferred from facts that are established: *Kerr on Fraud and Mistake*, 450. Chancellor Kent says that a deduction of fraud may be made, not only from deceptive assertions and false representations, but from facts and circumstances which may be trivial in themselves. It is seldom that fraud is proved by positive evidence, and it may be presumed from facts and circumstances proved: *Farmer v. Calvert*, 44 Ind. 209; *Kane v. Drake*, 27 Ind. 29; *Levi v. Kraminer*, 2 Ind. App. 594, 28 N. E. 1028. In the case before us, the court found in favor of appellee on the question of fraud and intent, and it is sufficient for us to say that from all the facts, surroundings of the parties, and circumstances disclosed by the evidence,

the court was fully justified in its conclusion upon this question. It would unduly lengthen this opinion to state, even in detail, the facts and circumstances upon which such finding and judgment rest.

Counsel next direct their argument to the asserted proposition ²⁰ that the evidence shows that the conveyance was not fraudulent as to appellee, for the reason that it is shown that appellant De Ruiter, at the time of the conveyance, had sufficient remaining property out of which appellee could satisfy her claim. Under the evidence in this case, the court was authorized to find that after De Ruiter made the conveyance complained of, he did not have, and has not since had, sufficient property subject to execution to satisfy appellee's claim. The court was authorized in reaching this conclusion, upon the evidence of De Ruiter himself, and we cannot disturb the finding and judgment upon contradictory evidence. When De Ruiter was called by appellee, as a witness in her behalf, his evidence clearly disclosed the fact that after the conveyance of his real estate he did not have to exceed five hundred dollars or six hundred dollars worth of property, and this was of a precarious and uncertain value. When he was testifying as a witness for himself, he bolstered up his former statement by testifying that he had certain credits due him, consisting of an interest in machinery of the value of two hundred and fifty dollars, some building and loan stock, and some household goods, aggregating in all something over five thousand dollars. Over four thousand dollars of this sum consisted of credits due from certain paving companies and from a certain estate. Such credits were not subject to execution and sale to satisfy appellee's demand, and the court's finding that he did not have sufficient property, subject to execution, to satisfy such claim, was fully warranted.

It is next argued that the court erred in ordering the sale of the real estate described—the conveyance of which was set aside as fraudulent—to satisfy the judgment for alimony, etc., and hence it was error to overrule the motion to strike out that part of the finding and judgment. There is no real merit in this contention. That a creditor may go into court and attack a conveyance of his debtor as fraudulent, and ask that such conveyance be set aside, and the property be subjected to execution and sale to satisfy his claim, when reduced to judgment, there is no doubt. Section ²¹ 1059 of Burns' Revised Statutes of 1901 provides that the decree for alimony to the wife shall be for a sum in gross. This the court fixed in the decree before us,

and that, together with the allowance made her for her attorneys, constitutes her claim. To pay and satisfy this claim, the court was authorized to direct that the real estate, or so much thereof as was necessary, should be sold on execution, etc.

It is urged that the motion to strike out the allowance made to appellee for attorneys' fees should have been sustained. It is made the duty of a trial court, in decreeing a divorce to the wife, or on refusing one on the application of the husband, to require, by order, that the husband pay all reasonable expenses of the wife in the prosecution or defense of the petition, etc.: Burns' Rev. Stats. 1901, sec. 1054. Such allowance has been held to include attorneys' fees: McCabe v. Britton, 79 Ind. 224; Musselman v. Musselman, 44 Ind. 106. Under the statute and the decisions, it is made the imperative duty of the court to make such allowance on the final disposition of the case. We do not think there was any error in this ruling.

From the whole record, we do not feel justified in reviewing the action of the court in overruling the motion to modify by reducing the amount of alimony and attorneys' fees. The amount of alimony as fixed by the decree is, in our judgment, both moderate and reasonable, when considered in connection with the value of De Ruiter's real estate. The amount fixed by the court was about one-fifth of the value of the real estate. True, as counsel contend, appellee was a childless second wife, but this fact does not change the rule that the award for alimony shall be in such sum as to leave her in at least as good condition pecuniarily after the divorce as she would have been in as a surviving widow: Musselman v. Musselman, 44 Ind. 106; Graft v. Graft, 76 Ind. 136.

Again, 2 Bishop on Marriage and Divorce, section 468, lays down this rule: "No one should be permitted to suffer in purse for another's wrong. Hence, alimony, when given to ²² an innocent and injured wife, should be in a proportion to leave her, at least, as well off pecuniarily, in noncohabitation as she would be in cohabitation."

Our supreme court in Yost v. Yost, 141 Ind. 584, 41 N. E. 11, quotes approvingly the above rule. The rule prevails in this state that the trial court has a broad discretion in awarding alimony, and an appellate court will not interfere therewith unless an abuse of such discretion is manifest: Gussman v. Gussman, 140 Ind. 433, 39 N. E. 918, and authorities there cited.

In this case the trial court certainly did not abuse its discretion. Neither do we think that the allowance for appellee's at-

torneys was unreasonable. Counsel urge that because appellee owned property of the probable value of two thousand five hundred dollars, which was encumbered six hundred dollars, it was error of the court to allow her attorneys' fees. The authorities cited *Kenemer v. Kenemer*, 26 Ind. 330; *Sellers v. Sellers*, 141 Ind. 305, 40 N. E. 699, and relied upon by appellant, are not in point, for they relate to temporary allowances pending the case. Under the statute above cited and the authorities, the court was justified in making the allowance: See *Harding v. Harding*, 144 Ill. 588, 32 N. E. 206; *Sellers v. Sellers*, 141 Ind. 305, 40 N. E. 699; *Lumpkin v. Lumpkin*, 78 Ill. App. 324; *Merritt v. Merritt*, 99 N. Y. 643, 1 N. E. 605.

The third reason for a new trial is that the decision and judgment are not sustained by sufficient evidence, and counsel have discussed the question thus raised at some length. It is unnecessary for us to go over the evidence, even in the abstract. A careful consideration of all the evidence leads us to the conclusion that the decision and judgment are fully sustained by it.

The fifth, sixth, seventh, eighth, tenth, eleventh, twelfth, fifteenth, sixteenth and seventeenth reasons in appellant De Ruiter's motion for a new trial question the action of the court in certain of its rulings on the admission of evidence. Without going into detail, it is sufficient for us to say that we do not find any reversible error in any of such rulings.

²³ What we have said relative to appellant De Ruiter's motion for a new trial is applicable to many of the reasons assigned for a new trial by appellant Vanderwerf. The tenth, eleventh and twelfth reasons, however, of the latter's motion, present questions which should be considered and decided. They challenge the action of the court in permitting appellee to testify to what was said and done at the time the power of attorney and other instruments above referred to were signed. It is proper to say in this connection that appellee's position is that she did not know she had signed a power of attorney, and that she was deceived by her husband, who represented to her that the three instruments which she signed were two deeds, and a release.

She was asked the following questions, and was allowed to answer them: "What is the fact as to whether or not you relied upon what Mr. De Ruiter said concerning those instruments as to their nature?" Another question was identical to this. The third was: "What is the fact as to whether or not any of those papers were delivered to you?" Counsel contend that, as she could read, she was bound to know what papers she had signed,

and had no right to rely upon what her husband told her, and that no confidential relations existed between them. It is fairly inferable from the evidence that appellee believed that all differences between her and her husband had been amicably settled, and that they would continue to live together as husband and wife. This being true, she was not dealing with him at arm's length, but in confidence, fully relying upon his promises and representations.

The following rule is laid down in 14 American and English Encyclopedia of Law, second edition, 194: "It is well settled that where it appears that a fiduciary or confidential relation existed between the parties at the time of the transaction alleged to be fraudulent, such as trustee and cestui que trust, . . . husband and wife, . . . or that one of the parties for any reason possessed a power or influence over the other, or ²⁴ that one of the parties was laboring under a disability such as mental weakness or intoxication, the existence of such relation or such power or influence or such disability raises a presumption of fraud, and the burden of proof is upon the party seeking to sustain the transaction." The rule thus stated is amply supported by the authorities, many of which are cited, following the text.

The relations existing between husband and wife are most intimate and confidential in their character, and it is the rule that no relation known to the law affords so great opportunity for the existence of undue influence as that existing between them: 27 Am. & Eng. Ency. of Law, 480, and authorities there cited. This being true, where the husband and wife contract together, and the agreement is such as to operate to the advantage of the former, equity will closely scrutinize the transaction: See authority last cited.

At the time of the transaction complained of, appellant De Ruiter and appellee were husband and wife. It is clear from the whole record that he exerted an undue influence over her, and, by misrepresentation, induced her to place herself in a position by which she might have been deprived of all her property rights as a wife. Under these circumstances and conditions, it was competent for her to testify as to what was said and done leading up to the consummation of the transaction in question.

Before concluding this opinion, it is proper to remark that appellant Eva G. Vanderwerf paid no consideration for all the valuable real estate conveyed to her. Taking all the circumstances, conditions, and surroundings disclosed by the record, we are firmly convinced that there was a well laid and devised plan or scheme between appellants to defraud appellee out of her

property rights as the wife of appellant De Ruiter, and the evidence fairly supports the conclusion reached by the trial court.

Judgment affirmed.

A Judgment for Alimony has been held to be a debt of record as much as any other judgment for money is: *Conrad v. Everich*, 50 Ohio St. 476, 40 Am. St. Rep. 679, 35 N. E. 58. But see *Welty v. Welty*, 195 Ill. 335, 63 N. E. 161, 88 Am. St. Rep. 208, and the cases cited in the cross-reference note thereto. Such a judgment in favor of a wife makes her husband, in effect, a debtor owing her the amount adjudged to be paid, and entitles her to the same remedies as any judgment creditor: *Wetmore v. Wetmore*, 149 N. Y. 520, 52 Am. St. Rep. 752, 44 N. E. 169. The judgment may constitute a lien on his land: *Johnson v. Johnson*, 22 Colo. 20, 55 Am. St. Rep. 113, 43 Pac. 130, *Gaston v. Gaston*, 114 Cal. 542, 55 Am. St. Rep. 86, 46 Pac. 609.

Attorneys' Fees in divorce proceedings are considered in *Milliron v. Milliron*, 9 S. Dak. 181, 62 Am. St. Rep. 863, 68 N. W. 286; *Johnson v. Johnson*, 107 Wis. 186, 81 Am. St. Rep. 836, 83 N. W. 291; *Barth v. Barth*, 102 Ky. 56, 80 Am. St. Rep. 335, 42 S. W. 1116; *Ditmar v. Ditmar*, 27 Wash. 13, post, p. 817, 67 Pac. 353.

PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY v. PARISH.

[28 Ind. App. 189, 62 N. E. 514.]

RAILWAYS.—Trees Overhanging a Track so Low that they come in contact with and injure employes while engaged in their duties on the tops of cars are not dangers incident to the service, nor are they dangers of which employes are presumed to know; and hence they are entitled to recover for injuries suffered therefrom if themselves free from contributory negligence. (p. 123.)

RAILWAYS.—Trees Overhanging Track—Employes are not Bound to Know of.—Trees overhanging a railway track are not such an open and obvious obstruction that the court can say, as a matter of law, that an employe in the discharge of his duties is bound to see them, and is therefore chargeable with knowledge of the danger from them. (p. 124.)

RAILWAYS.—Conductors and Trainmen have the Right to assume that the company would not permit any obstruction to remain above its tracks which would be dangerous to its employes while operating its trains. If there is such obstruction, and the company knows it, it is its duty to notify its trainmen of the danger, and it is no part of the trainmen's duty to anticipate such obstruction. (p. 124.)

RAILWAYS.—If the Limbs of a Tree Extend Over a Railway Track, Though Its Body does not Stand on the Right of Way, and such limbs constitute a constant danger to the lives of employes when on the top of freight-cars, and are of sufficient size and strength to push a man off of the top of a car running from three to six miles an hour, the railway has a right to remove such dangerous

overhanging limbs, and, failing to do so, is guilty of negligence, for which its employ  s may recover if injured thereby. (p. 125.)

NEGLIGENCE, CONTRIBUTORY—Absence of, How may be Established.—The absence of contributory negligence may be established by circumstantial evidence. When it appears from the evidence that a railway conductor was pushed from the top of a slowly moving train by the limbs of a tree overhanging the track, and that he was a sober, careful, competent, and experienced man, and was in the proper place and in the performance of work in the line of his duty, and had never been warned of the existence of the danger, and that a witness saw the motion of a man's arm, and branches of the tree moving, and a lantern fall, the jury is warranted in finding that the conductor, at the time of his injury, was not chargeable with contributory negligence. (p. 127.)

NEGLIGENCE, CONTRIBUTORY—Evidence to Rebut.—Slight, positive testimony, whether circumstantial or otherwise, when taken in connection with the instinct of self-preservation and the desire to avoid pain or injury to one's self, may be sufficient to support the conclusion that one who suffered injury did not help to bring it upon himself. (p. 128.)

NEGLIGENCE, CONTRIBUTORY—When a Question for the Jury.—Whether an obstruction on the line of a railway track consisting of the limbs of a tree overhanging the track, so as to push from the top of a car an employ   thereon, is an open and obvious defect, and the danger therefrom apparent, is a question for the jury, and their finding upon it cannot be ignored. (p. 130.)

JURY TRIAL.—An instruction cannot be regarded as erroneous and entitling the appellant to a reversal of the judgment or to a new trial, because it states some of the material facts and omits others, if, taken in connection with other instructions, the whole of the law and the facts were sufficiently disclosed. (p. 131.)

NEGLIGENCE, CONTRIBUTORY—Equal Means of Knowledge.—A railway employ   injured by an obstruction on or over the track is not precluded from recovering therefor, on the ground that he had an equal means of knowledge with his employer of the existence of such obstruction, unless it was also his duty to use those means. (p. 131.)

RAILWAYS.—The Duty of Making an Examination for the Purpose of Discovering Whether an Obstruction exists which is likely to render dangerous his performance of his duty by an employ   rests upon the employer, and the employ   is, therefore, not necessarily chargeable with contributory negligence because he did not make such examination or discovery. (p. 131.)

EVIDENCE that a Person Killed Upon a Railway Was a Careful Man About His Work is not admissible in an action to recover damages for such killing as bearing on the measure of damages. In determining the value of a human life, consideration may be given to the habits of the decedent as to sobriety and industry, because such qualities affect his capacity to earn money. (p. 132.)

NEGLIGENCE.—Evidence that a Railway Had not Erected Any Warners or Tell-tales on either side of a tree by the overhanging limbs of which an employ   was injured, is admissible. Though the failure to erect them may not be negligence, their absence tends to prove that the decedent did not know of such obstruction, and had not been warned of the existence of danger. (p. 132.)

NEGLIGENCE—Absence of Warning.—Evidence that a conductor injured by being pushed from the top of a moving train by

the overhanging limbs of a tree had not been notified of the existence of this obstruction is admissible. It was not such a danger as is ordinarily incident to the business of railroading, and if the corporation knew of its existence, it should have informed its employés. (p. 132.)

Action by the administratrix of John H. Parish to recover from the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company damages for the loss of his life while in its employ. Judgment for the plaintiff; defendant appealed.

John L. Rupe, for the appellant.

J. F. Robbins, R. A. Jackson, and H. C. Starr, for the appellee.

¹⁰² ROBINSON, P. J. Appellee sued for damages for the alleged negligent killing of her intestate. Demurrers to each of the two paragraphs of complaint overruled. Verdict in appellee's favor. Motion for a new trial overruled. Judgment on the verdict. The errors assigned and argued question the rulings on the demurrers and the denial of a new trial.

The averments of the first paragraph upon the questions of negligence and freedom from contributory negligence are, substantially, that on the twenty-first day of July, 1898, decedent was a freight conductor, and as such it was necessary, in the proper management of trains, to go on the tops of freight-cars and walk over the same while in motion; that at that time, and for some time prior thereto, there was a certain tree standing and growing along appellant's right of way and near to the tracks, the limbs and branches of which were hung and extended over and above the tracks to such height and in such manner and position as that the same would come in contact with, and form a dangerous obstruction to, anyone standing or walking on or along the tops of freight-cars at that point, all of which facts were at all times well known to appellant, "but of which facts, the plaintiff avers, the said John H. Parish never at any time had any notice or knowledge, and of which facts he was at all times wholly ignorant"; that appellant, well knowing the existence of such obstruction, and the nature and dangerous character of the same, at all times, knowingly, carelessly and negligently failed to remove or cause such obstruction to be removed, but knowingly, carelessly, and negligently suffered and permitted the same to remain an obstruction, and carelessly and negligently failed to provide or maintain any apparatus or means whatever in any place to give warning to any trainmen

who might be upon the tops of cars of the existence of such obstruction, or of the approach of trains to the same, and at all times carelessly and negligently wholly failed to give to trainmen, by any means ¹⁹³ whatever, any notice or knowledge of the existence of such obstruction; that between 12 and 1 o'clock on the morning of July 21, 1898, decedent was in charge of a freight train as conductor, and a short time before the train reached the point overhung by the limbs and branches of the tree it became his duty to go upon the tops of the moving freight-cars, and stand and walk over the tops of the same, which he did, and while so doing, and while in the exercise of all proper care and diligence, in entire ignorance of the obstruction, and wholly free from fault or negligence, he was suddenly, without warning, brought in contact with the obstruction and thrown to the ground, producing injuries resulting in death. The amended second paragraph differs from the first only in that it is more specifically averred that decedent was ignorant of the obstruction and the danger thereof. But as the averment of the first paragraph upon that point, which is set out above, amounts to an averment that decedent was ignorant of the obstruction and of the danger, the two paragraphs in their essential averments are substantially the same.

The pleading charges that appellant, at the time in question and prior thereto, negligently permitted the branches of a tree to overhang its tracks so as to form a dangerous obstruction to employes while discharging certain duties, and that appellant knew the existence and nature of the obstruction, and its dangerous character, and had never given any of its trainmen any notice of the existence of the obstruction; that the decedent had no notice or knowledge of the existence of the obstruction or of the danger; and that decedent, while in appellant's employ, and in the discharge of his duty as a conductor, and without fault on his part, was struck by the overhanging branches and thrown from the car and killed.

It cannot be said that the danger from the branches of a tree, which the company permits to hang over its tracks so low that they may come in contact with employes while engaged ¹⁹⁴ in their duties on the tops of its cars is a danger incident to the service. Nor is it such a danger that the employe would be presumed to know it. It is true, it is not averred how long decedent had been engaged in the service; and, being of mature years, it will be presumed he had the knowledge and skill fitting him for the service. But the demurrer admits that he did not

not know of the danger; that he did not know of the obstruction. It was not such an open and obvious obstruction that we can say, as matter of law, that the employé, in the discharge of his duty, was bound to see it, and that he was, therefore, chargeable with knowledge of the danger from it. There are cases where it is apparent from the facts averred that the complaining party had an equal opportunity with the employer to know of a defect or obstruction, or where the conclusion is irresistible that he did know of it, in such case it is not sufficient to aver simply that he did not know it. But this is not such a case. "While an employé," said the court in *Consolidated Stone Co. v. Summit*, 152 Ind. 297, 53 N. E. 235, "assumes the risk from obvious defects or dangers, open to ordinary and careful observation, or such as would be known by the exercise of ordinary care (*Peerless Stone Co. v. Wray*, 143 Ind. 574, 42 N. E. 927), yet it is only necessary to allege that he did not know of such defect or danger; and such allegation not only repels actual knowledge, but any implied knowledge: *Evansville etc. R. R. Co. v. Duel*, 134 Ind. 156, 33 N. E. 355. To sustain such allegation, however, the evidence must show that the employé not only had no knowledge of the defect, but could not have known the same by the exercise of ordinary care."

Decedent had the right to assume that the company would not permit an obstruction to remain above its tracks which would be dangerous to its employés while operating its trains. If there was such an obstruction, and the company knew it, it was its duty to notify its trainmen of the danger. It was no part of decedent's duty to anticipate such an obstruction. He may have passed it seldom or often, and ¹⁰⁵ yet know nothing of its existence. It was not such an obstruction as he must necessarily see when passing over the road with his train. It was dangerous to an employé only when on top of a car. It does not appear from the pleading that decedent had ever passed over that part of the road before that trip. But even if that did appear, there is nothing in the complaint to show that he must necessarily see the obstruction when passing it, or that any facts existed within his knowledge to warn him of any danger. The demurrers to the complaint were properly overruled: See *Baltimore etc. R. R. Co. v. Rowan*, 104 Ind. 88, 3 N. E. 627; *Louisville etc. R. R. Co. v. Wright*, 115 Ind. 378, 7 Am. St. Rep. 432, 16 N. E. 145, 17 N. E. 584; *Pennsylvania Co. v. Sears*, 136 Ind. 460, 34 N. E. 15, 36 N. E. 353.

Appellant's road where it crossed the main street of the town ran north and south, and consisted of two tracks, the west track being the main track; and the other, as near the main track as would leave proper clearance, was a switch track used for switching and a passing siding for trains. Six or seven feet east of the switch track, at the southeast corner of the crossing and the street, and on the outer edge of the sidewalk in front of private property, and not upon appellant's right of way or property, stood a tree with a limb about twelve feet from the ground, the branches of which extended out toward the tracks. The jury found that when Parish was injured, and during more than a year prior thereto, the limbs and branches of this tree extended over the switch track, constituting an obstruction dangerous to the lives of employes when on the tops of freight-cars, and sufficient in size and strength to push a man off of the top of a car running from three to six miles an hour. There is evidence to sustain these findings. Appellant not only had the right to remove such overhanging limbs, whether the tree stood upon its right of way, or upon the premises of an adjoining land owner, but it was its duty to remove them, if such removal was necessary to provide a reasonably safe place for its employes to work. From the whole record it is ¹⁹⁶clear that, as to appellant's negligence, the jury's general verdict in appellee's favor was authorized: See Toledo etc. R. R. Co. v. Loop, 139 Ind. 542, 39 N. E. 306.

The jury answered that decedent was pushed or knocked off the car by the limbs of the tree, but it is argued that the evidence leaves it a matter of speculation as to how he came to fall, and that there is no evidence that he was at the time in the exercise of due care. It is well settled that the absence of contributory negligence, as any other disputed fact, may be established by circumstantial evidence. Charles E. Hebbler testified that he was front brakeman on south-bound train No. 76; that decedent was conductor on north-bound train No. 87; that witness' train was standing on the main track, waiting for decedent's train to pull in on the switch, and, as it came in on the switch, he says, "Why, I was standing on top, and I could see the motion of a man's arms and see the limbs moving, and then I seen the lantern fall, and then I rushed over to the engine and told the fireman about it, and they were running so very slow that he didn't think anybody went off the top; he told me, he said he didn't think there was anyone fell off; and about eight or ten more car-lengths passed by, and we seen a light in

between two cars, and then we thought probably that it was just his lantern fell off, and we didn't pay any more attention to it until we got to Hamilton." Upon cross-examination he testified that he was on top of a car eight or ten car-lengths north of the street crossing, and that decedent's train was moving at the rate of four or five miles an hour, that he saw the motion of the limb work up and down, and could see the limbs of the tree moving, and saw a lantern fall.

"Q. You didn't see a man, did you? A. Why I was too far off; I couldn't see the man; no, sir.

"Q. Well, as a matter of fact, you didn't see any man, did you? A. No, sir."

Amanda White testified that on the night in question, on account of sickness, she was sitting at an open window which overlooked the railroad crossing eighty or a ¹⁹⁷ hundred feet away, and saw a man fall from a north-bound freight train on the switch; that he was past the tree when he fell; that when he fell he was north of the tree and south of the trolley wire (in the middle of Main street). She did not see him on top of the car, but he had just left the car and was falling when she saw him. On cross-examination she testified that he seemed to drop as though he had no life when he fell; heard him strike the ground; that she did not see the man at the time he passed the tree; did not see any motion of the limbs; that she could see the maple tree plainly from where she was. Robert D. White, husband of Amanda, testified that, being awakened by his wife, he went to the crossing and saw the man, unconscious, lying on his right side, eight or nine feet east of the switch track, and twenty-five or twenty-eight feet north of the tree; also a broken lantern lying near. Joseph H. Brown testified that he was rear brakeman on decedent's train; that he and decedent were in the caboose together, and that when the train had pulled partly in decedent took his lantern and went out; that the train remained standing several minutes, and when it pulled in on the siding witness left the caboose, closed the switch, returned to the caboose, and when they had passed over Main street crossing and stopped he saw the conductor's body lying in the road. There was also evidence that two or three small branches of the tree about a foot and a half to two feet long and about as thick as a lead pencil, freshly broken, were found on the ground near decedent, and between him and his lantern, and the next day a space about two feet or more was discovered in the limbs that overhung the track, where the twigs and limbs had been freshly broken off.

The record shows that decedent was a sober and careful man, and a competent and experienced railroad conductor; that he had been in appellant's employ as conductor eight or nine years; that when injured he had with him his lantern, and was in a proper place, and in the performance of work ¹⁹⁸ in the line of his duty; that he had never at any time been warned in any way of the existence of the danger. He was seen to take his lantern and leave the caboose. A witness saw the motion of a man's arms, and saw the branches of the tree moving, and saw the lantern fall. Another witness saw his body falling from the top of the car. His body was found, taking into consideration the height of the car and the speed of the train, at a place consistent with the theory that the branches caused him to fall. Taking all the facts and circumstances proved, and the inferences that may be fairly drawn from these facts and circumstances, it cannot be said there was nothing upon which the jury could base the answer to an interrogatory that decedent was pushed or knocked off the train by the limbs of the tree. Nor can it be said that there is nothing in the record from which the jury could say that decedent was in the exercise of due care. It is argued that the nature of the obstruction was such that the decedent, in the exercise of ordinary care, must necessarily have seen it; that it was open and obvious; and that decedent, in exercising the care devolved upon him by law, must have known of its existence. The jury found as a fact, in answer to interrogatories, that the branches were not at all times an open, apparent, and obvious obstruction to a person passing on the switch on the outside of a train, and that a person on top of a freight train running from three to six miles an hour and on the lookout for obstructions would not at all times see the tree and limbs. The jury also found that decedent did not know, and that while acting as conductor he did not have a reasonable opportunity to learn, of the dangerous character of the obstruction, and that in passing over the switch on the inside of a moving caboose he did not have a reasonable opportunity to discover such dangerous character.

It appears from the evidence that at the time of the injury decedent was engaged in running his train north, in on the switch. An extra train was immediately ahead of his ¹⁹⁹ on the switch, and still another train on the main track going south. Decedent's train stood partly on the switch, but with the rear end on the main track. While these two trains were thus standing on the switch and main track, the south-bound

train passed the north end of the switch and stopped, and the extra passed out onto the main line. Decedent then moved his train north to get the rear of the train off the main line so the south-bound train could pass, and while so engaged the accident happened. Decedent's attention would naturally be occupied with the movements of these trains. There was nothing to suggest to him that he was in any danger from any overhead obstruction. He had the right to rely upon the appellant's performance of its duty to remove such obstruction, or give him notice of its existence. The jury found that there were electric lights near this crossing, but that they did not light the crossing well, and so that persons and objects might be readily distinguished at and immediately about the crossing, and that a person passing over the crossing at night could not from all points readily see and distinguish the tree and limbs, and that the view of the tree to a person passing it on the outside of a train on either the main or side track was obstructed by smoke, shadows and insufficient light, to a considerable extent. He had the right to give his whole attention to the duty he was performing. He was in a place where his duty to appellant required him to be. He was ignorant of any danger. He did not know of any obstruction. Rules of appellant, copies of which were furnished all conductors, made it the duty of appellant's supervisor to note anything liable to obstruct the track and have it removed. Not only should all the facts and circumstances surrounding him at the time be taken into consideration, but it is proper to consider, also, on the question whether he exercised care, that he was sober and industrious, and a young man in good health, providing for his family, an experienced conductor earning from eighty dollars to one hundred dollars per ³⁰⁰ month, and that in a person so situated it is to be inferred that the instinct of self-preservation was as strong as in other men. Slight positive testimony, whether circumstantial or otherwise, when taken in connection with the instincts of self-preservation, and the desire to avoid pain or injury to one's self, may be sufficient to support a conclusion that one who suffers injury did not help to bring it upon himself: See *Allan v. Willard*, 57 Pa. St. 374; *Chicago etc. R. R. Co. v. Gunderson*, 174 Ill. 495, 51 N. E. 708; *Hopkinson v. Knapp*, 92 Iowa, 328, 60 N. W. 653; *Way v. Illinois etc. R. R. Co.*, 40 Iowa, 341; *Greenleaf v. Illinois etc. R. R. Co.*, 29 Iowa, 14, 4 Am. Rep. 181; *Gay v. Winter*, 34 Cal. 153; *Johnson v. Hudson River R. R. Co.*, 20 N. Y. 65, 75 Am. Dec. 375; *Teipel v. Hilsendegen*, 44 Mich. 461, 7 N. W. 83; *Evans-*

ville St. R. R. Co. v. Gentry, 147 Ind. 408, 62 Am. St. Rep. 421, 44 N. E. 311; Cincinnati etc. R. R. Co. v. McMullen, 117 Ind. 439, 10 Am. St. Rep. 67, 20 N. E. 287; Illinois etc. R. R. Co. v. Nowicki, 148 Ill. 29, 35 N. E. 358; Citizens' St. R. R. Co. v. Ballard, 22 Ind. App. 151, 52 N. E. 729.

Complaint is made of certain instructions given, and the argument against them is that they incorrectly state the law as to assumed risk. The questions presented by appellant's counsel upon the instructions given, and the court's refusal to give some of the instructions requested, rest upon the doctrine of assumed risk. The obstruction here complained of is not one that was erected and maintained and necessary for use in the operation of the road. It is a familiar rule that by the contract of service an employ  assumes such risks as are naturally incident to the particular service. And he assumes the risk of injury from such dangerous obstructions as are known to him in fact, or which ordinary care on his part would discover: Pennsylvania Co. v. Ebaugh, 152 Ind. 531, 53 N. E. 763; Wabash R. R. Co. v. Ray, 152 Ind. 392, 51 N. E. 920. And he assumes the risk of injury from dangerous obstructions, which, by reason of their open and obvious character in and of themselves, give him notice. The jury ²⁰¹ answered that decedent did not know of the obstruction, nor did he have reasonable opportunity to know it. The theory of the trial court was that the nature of this obstruction was such that the jury should determine from all the facts and circumstances proved whether decedent had actual notice or knowledge of its existence, or had reasonable opportunity to know of it, and that, if he did not, the risk was not assumed. Upon this theory the court correctly instructed the jury. Appellant's counsel seem to proceed upon the theory that the obstruction was of such a character that an employ  was necessarily bound to know of its existence, and that the answers of the jury upon the question of notice or knowledge must be ignored. But whether such an obstruction as that in question is an open and obvious defect, and the danger therefrom obvious and apparent, were questions of fact for the jury. Decedent had been in the employ of appellant as conductor over this line of road from 1891 to September, 1895, and from that time until May 31, 1898, he had made no trip over the line. The record does not show that during the time prior to September, 1895, he knew of, or had an opportunity to know of, this obstruction, if in fact it then existed. Moreover, the question here would be whether decedent knew of the obstruc-

tion when injured, rather than as to his knowledge at some prior time: See *City of Bluffton v. McAfee*, 23 Ind. App. 112, 53 N. E. 1058.

The jury answered that from May 31 to July 21, 1898, decedent made forty-six trips, and that during this time he passed over the sidetrack seven or more times. They also answered that these branches, in so far as they constituted any obstruction to the sidetrack, were not at all times an open, apparent, and obvious obstruction to a person passing the same on the sidetrack on the outside of a train. The overhanging limbs constituted an obstruction over the sidetrack only. The branches were above the top of an ordinary box freight-car. Decedent may have passed over the sidetrack a number of times in the performance of his ²⁰² duties as a conductor, and yet never have seen the overhanging branches. And he may have seen the tree and its branches while passing along on the main track, and yet the danger from them would not necessarily have been apparent. It was not an obstruction always dangerous to employes passing over the switch, but was dangerous only to a person on top of a car; and, unless the tree and its branches were seen with reference to a car, their dangerous character might not be apparent. So that knowledge of the existence of the tree and its branches, and knowledge of the danger from them, are not necessarily one and the same. It was admitted that he had been given no actual notice of the obstruction. There is nothing in the record to show that he was ever at any time in a position where he must necessarily have seen the obstruction: See *Fonda v. St. Paul City R. Co.*, 71 Minn. 438, 70 Am. St. Rep. 341, 74 N. W. 166. When all the evidence in the case is considered, it must be concluded that whether decedent assumed the risk, or was charged with notice of the danger to which he was exposed, was a question for the jury: See *Kelleher v. Milwaukee etc. R. Co.*, 80 Wis. 584, 50 N. W. 942; *Sweet v. Michigan Cent. R. Co.*, 87 Mich. 559, 49 N. W. 882; *George v. Clark*, 85 Fed. 608; *Pidcock v. Union Pac. R. Co.*, 5 Utah, 612, 19 Pac. 191; *St. Louis etc. R. Co. v. Irwin*, 37 Kan. 701, 1 Am. St. Rep. 266, 16 Pac. 146; *Johnston v. Oregon etc. R. Co.*, 23 Or. 94, 31 Pac. 283; *Boss v. Northern Pac. Ry. Co.*, 2 N. Dak. 128, 33 Am. St. Rep. 756, 49 N. W. 655; *Hulehan v. Green Bay etc. R. R. Co.*, 68 Wis. 520, 32 N. W. 529; *Fitzgerald v. New York etc. R. R. Co.*, 88 Hun, 359, 34 N. Y. Supp. 824; *Keist v. Chicago etc. R. R. Co.*, 110 Iowa, 32, 81 N. W. 181.

The sixth instruction does not purport to state to the jury all the material facts they are required to determine, but expressly states that they "will be required to determine as material questions in this case the following facts, among others," and proceeds to state certain facts. This instruction ²⁰³ cannot be considered erroneous, on the ground that it omits the element of decedent's duty respecting open and obvious obstructions, when taken in connection with other instructions given. The court instructed the jury upon the employe's duty to exercise reasonable and ordinary care and diligence for his own safety, and that if he received information or had notice of such conditions and dangers, and he afterward, with knowledge thereof, voluntarily remained and continued in the service, and was injured, he would be held to have assumed the risk of such conditions and dangers, and could not recover.

There is no error in the court's refusal to instruct the jury if the evidence showed that decedent had equal opportunity with appellant to see and know of the existence of the overhanging limbs, and their character and extent, he would, by remaining in the service, assume the risk and dangers arising therefrom. The jury answered that, at the time of and prior to the injury, decedent did not have opportunity equal with appellant's officers and agents to know of the existence and location of the tree and its branches, and that he did not know of, nor did he have reasonable opportunity to know of, their dangerous character. The obstruction was one arising out of appellant's negligence, and equal opportunity to know of the existence of the obstruction, and equal opportunity to know of its dangerous character are not one and the same thing. Moreover, it cannot be said that any duty rested upon decedent to make any examination of appellant's road for such an obstruction as that here in question. But such a duty did rest upon appellant. "The true rule," say Shearman and Redfield on the Law of Negligence, fifth edition, section 217, "as to 'equal knowledge' is that, when the means of knowledge and the duty to use those means are equal, between master and servant, and neither uses those means, both are equally at fault." And in *Louisville etc. R. R. Co. v. Berry*, 2 Ind. App. 427, 28 N. E. 714, it is said: "The general statement is made in some of the books and decisions ²⁰⁴ of courts that the law will not permit a servant to recover from his master for an injury resulting on account of a dangerous defect in the service, if he had the same means of discovering the defect as the master had. This principle can apply only where the servant is under the same obligation as the mas-

ter to know the condition of the service": See, also, *Salem Stone etc. Co. v. Griffin*, 139 Ind. 141, 38 N. E. 411.

A witness who had testified that he had known decedent a number of years, had frequently seen him at work as a railroadman, and had worked with him, saw him almost every day during the last years of his life, was asked to state "what sort of a man he was, as to whether or not he was a careful man in and about his work as a railroadman, or otherwise." Objection was made that the question called for an opinion; that the evidence was not competent to prove freedom from contributory fault, and was not proper under any issues in the case. It is no doubt true that such evidence would not be competent to excuse negligence; but, although the cases do not agree, it would be competent upon the measure of damages. The loss from the death of a careful, experienced, railroadman would be greater than from that of one who was careless and inexperienced. The law estimates the value of a human life as best it can, and in doing so it will take into consideration, among other things, the habits of the individual as to sobriety and industry, and such qualities as affect his capacity to earn money. The evidence in question was not improper to go to the jury on the question of damages. Upon a proper request, a court should limit by an instruction such evidence to the particular question upon which it is competent: See *Board etc. v. Legg*, 110 Ind. 479, 11 N. E. 612; *Hogue v. Chicago etc. R. R. Co.*, 32 Fed. 365; *Missouri Pac. Ry. Co. v. Moffat*, 60 Kan. 113, 72 Am. St. Rep. 343, 55 Pac. 837; *Wells v. Denver etc. R. Co.*, 7 Utah, 482, 27 Pac. 688; *Chicago etc. R. Co. v. Clark*, 108 Ill. 113.

205 It was not error to permit appellant's supervisor to testify that appellant had not erected any warners or tell-tales on either side of this tree. The complaint contains such an averment. Although no legal obligation rested upon appellant to erect and maintain such warners, and the failure to erect and maintain them would not be negligence, yet such evidence would be competent as tending to establish the fact that decedent did not know of the obstruction, and had not been in any way warned by appellant of its existence or of the danger. Nor was there any error in permitting appellant's trainmaster and chief train dispatcher to testify that decedent was not notified of the existence of this obstruction. The obstruction had existed for a sufficient length of time that appellant was bound to know of it. The complaint charged that appellant had not, by any means,

notified decedent of the danger. The danger here in question was not such as is ordinarily and usually incident to the business of railroading, and knowing of its existence, it was appellant's duty to inform its employes, the danger not being of such character that the employes were bound to take notice of it: *Louisville etc. R. R. Co. v. Wright*, 115 Ind. 378, 7 Am. St. Rep. 432, 16 N. E. 145, 17 N. E. 584.

Upon cross-examination of one of appellant's witnesses, he testified that after the injury, and on the same night, he picked up some small branches of a tree underneath the overhanging limbs. It was not reversible error to permit a question to be asked the witness on the further cross-examination, whether at the time he did not think there might be some connection between the broken branches and the injuries to decedent. What the witness thought could not be material as a substantive fact, nor would any such statement by him bind appellant. He had already testified without objection that he "didn't know but what they might be needed as evidence." As this was cross-examination of an employe of appellant called by it as a witness, appellee was not bound by the answer as made, but might make further ²⁰⁶ inquiry to determine whether the witness had fully given the true reason for his action. But even if it should be admitted that the evidence was not material, it cannot be said that it was necessarily prejudicial or harmful to appellant.

Judgment affirmed.

A Railway Company is Liable for injuries sustained by its employes from structures maintained along or over its tracks in close proximity to passing trains: Whipple v. New York etc. R. R. Co., 19 R. I. 587, 61 Am. St. Rep. 796, 35 Atl. 305; Boss v. Northern Pac. R. Co., 2 N. Dak. 128, 33 Am. St. Rep. 756, 49 N. W. 655; Louisville R. R. Co. v. Hall, 91 Ala. 112, 24 Am. St. Rep. 863, 8 South. 371; Louisville etc. Ry. Co. v. Wright, 115 Ind. 378, 7 Am. St. Rep. 432, 16 N. E. 145, 17 N. E. 584; St. Louis etc. R. R. Co. v. Irwin, 37 Kan. 701, 1 Am. St. Rep. 266, 16 Pac. 146; monographic note to Chicago etc. R. R. Co. v. Swett, 92 Am. Dec. 218, 219. The employe, in such cases, does not assume the risk or peril, unless he knows of the danger, or it is so obvious that he must be presumed to know it: Scanlon v. Boston etc. R. R. Co., 147 Mass. 484, 9 Am. St. Rep. 733, 18 N. E. 209; Gundlach v. Schott, 192 Ill. 509, 85 Am. St. Rep. 348, 61 N. E. 332. Contributory negligence on the part of the employe, however, may bar any right of action for the injuries: Louisville etc. R. R. Co. v. Hall, 91 Ala. 112, 24 Am. St. Rep. 863, 8 South. 371.

KELLY v. PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILROAD COMPANY.

[28 Ind. App. 457, 63 N. E. 233.]

LIMITATIONS OF ACTIONS—Statute, When Commences to Run.—If it is claimed that a culvert in an embankment erected by a railway company across a public highway was insufficient in size to carry away the accumulations of waters in times of heavy rains, and that by reason thereof plaintiff's lands were overflowed and damaged, the statute of limitations against his cause of action therefor commences to run at the date of his suffering the injury, and not at the date of the completion of the embankment and culvert. (p. 139.)

NUISANCE—Prescription.—The right to maintain a public nuisance cannot be acquired by prescription. Hence, the maintenance of an embankment and culvert across a public highway, however long continued, cannot result in the prescriptive right to so maintain them as to constitute a public nuisance. (p. 139.)

MUNICIPAL CORPORATIONS—Liability of for Accumulating and Casting Water upon Private Lands.—The accumulation in one channel of a large stream of water by the act of a city places upon it the duty to see that suitable provision is made for the escape of the water without injury to private property, and if, by reason of the insufficiency of the drain or other means provided, the accumulated waters are cast upon private property to its injury, the municipality is liable. (p. 140.)

Action to recover damages for the overflowing of the plaintiff's land. A demurrer to his complaint was sustained, and he thereupon appealed.

L. A. Douglas and H. W. Phipps, for the appellant.

S. Stansifer, M. Z. Stannard, and G. H. Voigt, for the appellees.

⁴⁵⁸ **WILEY, J.** Appellant was plaintiff below, and his complaint was held bad on separate demurrers. He declined to plead further, and judgment was rendered against him for costs. By his assignment of errors he questions the correctness of the court's action in sustaining the demurrers to the complaint.

The complaint avers that on December 3, 1867, the common council of the city of Jeffersonville passed an ordinance granting to the predecessor of appellee railroad company ⁴⁵⁹ the right to construct and maintain its railroad on and along Ninth street, between certain points named by said ordinance; that the ordinance imposed upon the company the duty "to make and main-

tain good and substantial culverts, such as the civil engineer of said city should direct and approve, at all places where said engineer or the common council might direct, so as to allow the free passage of water underneath said track and bank"; that in 1868 the railroad company, under the provisions of the ordinance, constructed its tracks and railroad bed on and along Ninth street, and in doing so threw up an embankment of earth forty feet wide at its base, twenty-five feet wide at the top, and about ten feet high; that said track and embankment were constructed by the railroad company under the direction of the civil engineer of said city, and when completed were approved by said city. The complaint then contains the following averments: "That at the time of the passage of said ordinance and the building of said track and bank, that portion of said city lying contiguous to said bank and track for as much as twenty-five blocks was low, inclined toward the north, and had a natural drainage across said Ninth street and said proposed track and bank, and the drainage of a large part of said city, to wit, twenty-five blocks were drained and carried toward the north across the said line of bank and railroad track and Ninth street; and said drainage and water and the flow thereof was not obstructed, but was free and carried away and off by natural drainage on the surface, without damage to the citizens and property within said city, and said water and drainage had access towards the north and at numerous places across the said proposed line of railroad track and banks, and was diffused and scattered in its flow along and over the surface across said line of railroad. . . . That the building of said track and bank cut off and obstructed the flow of water and drainage toward the north across the same, and the defendant railroad company carelessly failed and omitted to ⁴⁶⁰ make and maintain culverts and openings through said bank sufficient to allow the free passage of water underneath said track, but the plaintiff says that the defendant company built and constructed but one culvert and sewer underneath said track and bank, and the same was constructed within and on the public alley of the city [describing its location], but said culvert and sewer were insufficient in size, too small, and inadequate to permit the free passage of water and drainage through said bank under said track as aforesaid." It is also averred that the building of said track and bank was under the direction of said city, and prevented the free flow and natural drainage of water, rainfall, sewage, and drainage of a large portion of said city, viz., as much as twenty-five blocks, to ac-

cumulate and be at a point between Spring street and Indiana avenue, on the south side of Ninth street, in a certain open ditch constructed and maintained by said city, and connected with a certain sewer and culvert for the purpose of causing said water, sewage, and drainage to flow in and through said drain, ditch and culvert. It is further alleged that but for the construction of said bank, ditch, and drain, said water, drainage, and sewage would not otherwise accumulate and flow in said place, and that said bank, drain, ditch, sewer and culvert changed the natural surface flow of the rainwater of that portion of the city, and caused the same to flow in said ditch or drain and through said sewer and culvert; that prior to the time said bank was constructed that portion of the city lying contiguous thereto, for as much as twenty-five blocks, was low, inclined toward the north, and had a natural drainage across Ninth street, and that said drainage and water and the flow thereof was not obstructed, but was free, and was carried away by natural drainage on the surface without damage to the citizens and property within said city, and said water drainage had access toward the north, and at numerous places across the proposed line of railroad track and bank, and was diffused and scattered in its flow ⁴⁶¹ along and over the surface and across the said line of road; that on the tenth day of July, 1897, while said bank, drain and sewer were in the condition above described, there occurred a heavy fall of rain, and that "said rain and the drainage caused thereby" caused an accumulation of water to form in said ditch and drain, at said culvert and sewer, and said culvert being inadequate and insufficient in size to carry off the same through and under said track, caused the water and drainage to back up on the north side of said bank, and to be cast back upon plaintiff's private property, and overflowed into his store, destroying his property, etc.

The complaint shows that the natural flow of surface water on a contiguous territory of about twenty-five blocks was toward and over Ninth street, flowing to the north, and that the flow of the water was unimpeded, except by the embankment made by the railroad company. It also shows that the one culvert constructed and maintained was of insufficient size to carry the accumulation of water away in times of heavy rains, etc. That as a consequence of such obstruction and insufficient size of the culvert and the ditch or drain constructed by the city to gather and carry away the surface water, the water backed up and overflowed appellant's property, resulting in the damage

complained of. It is clear from the averments of the complaint that had it not been for the embankment and insufficient size of the culvert, no injury would have resulted to appellant.

It is urged by counsel for appellees that this is one of the instances known to the law where there is no commensurate remedy for the injury. The power of the city to grant an easement to the railroad company to construct an embankment and lay its track in the street is unquestioned by appellant, but it is urged that the law makes ample provision for the redress of any wrong resulting therefrom. Counsel for appellees base their argument, and maintain that there is no liability shown by the complaint, upon two propositions: 1. The statute of limitations; and 2. Rights acquired ⁴⁶² by prescription. These may properly be considered together.

It is contended by appellee that the right of action was barred by prescription, upon the theory that the right accrued at the time the embankment and culvert were constructed, and not at the time of the overflow and resulting injury. The authorities do not sustain this contention, and it is not in harmony with correct principles. In *Sherlock v. Louisville etc. Ry. Co.*, 115 Ind. 22, 17 N. E. 171, Zollars, J., quotes approvingly from 1 Redfield on Railways, 595, as follows: "The general rule, in regard to the time of the accruing of the action is, that, when the act or omission causes direct and immediate injury, the action accrues from the time of doing of the act, but where the act is injurious only in its consequences, as by undermining a house or wall, or causing water to flow back at certain seasons of high tide or high water, the cause of action accrues only from the consequential injury."

In that case the question was squarely presented whether the cause of action accrued at the time a certain bridge was constructed over a watercourse, or at the time the injury was caused by the overflow; and upon that question the court said: "As regards the limitation of time for bringing the action, we think that the plaintiff was properly entitled to succeed, both on the second and fourth pleas, for that the cause of action first arose when the damage was suffered, there being no complete cause of action till the damage was sustained. The defendants were guilty of no illegal act that could have been complained of as a trespass, and until it proved to be injurious there was no right to sue."

In that case it was also contended by the railroad company that, having maintained the bridge for twenty years, it had the

right to continue to maintain it as it was, although it caused adjoining lands to overflow. There the bridge was on the land of the railroad company, and the rights of the plaintiff could in no way be invaded by its maintenance until ⁴⁶³ he in some way suffered an injury on account thereof. The court disposed of the proposition in the following language: "Until a person's rights are in some way invaded, they cannot be destroyed or transferred to another by prescription. Time—in this state twenty years—is an essential element in the establishment of a prescriptive right, and, in a case like this, begins to run only from the date at which cause of action accrues in favor of the party against whom the right is asserted. As we have seen in this case, no cause of action accrued to appellant, by reason of the negligent construction of the bridge, until the overflow of his land in 1883, much less than twenty years ago." In the same case, the court quoted with approval from Wood on the Law of Nuisances, section 708, as follows: "There is a distinction between a prescriptive right to do some act upon one's own premises that operates injuriously to another, and a right to do some act upon another's premises. In the latter case each act of user, before the user ripens into a right, is a trespass, for which an action may be maintained at any time, while in the former no action can be maintained until some right has been invaded. In the one case there is an actual invasion of the property itself, while in the other there is a mere invasion of some right. . . . The rule is, . . . that to constitute an adverse user requisite to sustain the right, it must be shown that the user had actually invaded the rights of the person against whom the claim is made, in reference to the particular matter which is the subject of complaint, and that the user, during the entire statutory period and the invasion of the right, have produced an injury equal to, and of the character complained of, and of such character and to such an extent that at any time during that period an action might have been maintained."

In the case we are considering, the railroad company did not construct its embankment and culvert upon its own premises, but upon a public highway, to which the city granted it an easement for that purpose. By that act, if appellant ⁴⁶⁴ was injured, it was such injury as the public in general suffered, and for which he had no remedy.

The complaint does not locate appellant's property, and it may not have been on Ninth street or immediately contiguous thereto. The injury that resulted to him did not accrue until

the water was backed onto his premises by reason of the embankment and insufficient culvert, and until such injury accrued to his property he had no right of action. The complaint avers that the culvert was constructed at the intersection of Ninth street and an alley, and that on many previous occasions water had backed up and onto surrounding property causing injury, etc. This reference in the complaint to the location of the alley and previous damage done by an accumulation of water is to show that the nuisance complained of is a public one.

An alley is a highway: *Elliot on Roads and Streets*, secs. 1, 24. Any unauthorized obstruction which necessarily impedes or incommodes the lawful use of a highway is a public nuisance at common law: *Elliott on Roads and Streets*, 477; *Yates v. Town of Warrenton*, 84 Va. 337, 10 Am. St. Rep. 860, 4 S. E. 818; *Callanan v. Gilman*, 107 N. Y. 360, 1 Am. St. Rep. 831, 14 N. E. 264; *State v. Merrit*, 35 Conn. 314.

The complaint avers that the culvert was insufficient in size to carry off the water, and that from time to time caused overflow of the streets, alleys, and avenues. These facts show that such injurious results constitute a public nuisance. The demurrer admits the truth of all facts well pleaded, and it is clear, therefore, that the railway company's claim that it is not liable rests either in prescription or in adverse possession for over twenty years. If it rests in prescription, the theory that adverse possession of a public highway creates a right or title carries with it its own refutation. So if the right to maintain this negligently constructed and insufficient culvert can be claimed as a prescriptive right, by user, for over twenty years, it must be such as results from a private nuisance. But it is not a ⁴⁶⁵ private, but a public, nuisance, and the right to maintain a public nuisance cannot be acquired by prescription: *Pettis v. Johnson*, 56 Ind. 139; *Sherlock v. Louisville etc. Ry. Co.*, 115 Ind. 22, 17 N. E. 171. In *Pettis v. Johnson*, 56 Ind. 139, it was held that a city has no power to authorize obstructions in highways which, when constructed, will permanently interfere with the enjoyment of the rights either of the public or a private person. When, therefore, the railroad company took the franchise or easement granted to it by the city, it took it subject to the limitation which the law placed upon it that it would not construct or maintain anything which would permanently interfere with the rights of private persons, or would result to their injury. Also, it took it with the express limitations contained in the ordinance to construct and maintain sufficient culverts to carry off the water.

As between the city and railway company, on the one hand, and appellant on the other, he had a right, in common with all citizens and the public, to have the public streets and alleys of the city free from overflow of water; the right to be protected from the accumulation of drainage and surface water upon his premises caused by the appellees; the right to be protected from having water backed upon his premises by reason of a permanent obstruction such as is shown by the complaint; and the right to the continuous surface drainage, which naturally was toward Ninth street, and in the event such water was deflected by the city and such deflection caused an accumulation of water at any point more than would otherwise flow there, to have the city and those charged with making and maintaining culverts to carry off the water to construct the same in sufficient numbers and of sufficient capacity to carry off and discharge the water so gathered.

In this case it is averred that the city caused a ditch or drain to be constructed leading to the culvert. This would necessarily collect and carry to that point a greater volume of water than would otherwise have gathered there, and the culvert ⁴⁰⁸ being of insufficient size to discharge it, the necessary result was that it backed up. If surface-water is collected in gutters and made to flow to the mouth of a sewer, where by the insufficiency of the sewer it accumulates in large quantities and then flows back upon private property, the municipality must respond in damages: *Hitchins v. Mayor etc.*, 68 Md. 100, 6 Am. St. Rep. 422, 11 Atl. 826; *City of Dixon v. Baker*, 65 Ill. 518, 16 Am. Rep. 591.

The accumulation in one channel of a large volume of water by the act of a city places upon it the duty to see to it that suitable provision is made for the escape of the water, without injury to private property, and if by reason of the insufficiency of the drain, or other means provided, the accumulated waters are cast upon private property to its injury, the municipality will be liable: *Weis v. City of Madison*, 75 Ind. 241, 39 Am. Rep. 135; *City of Indianapolis v. Lawyer*, 38 Ind. 348; *City of Evansville v. Decker*, 84 Ind. 325, 43 Am. Rep. 86; *City of Crawfordsville v. Bond*, 96 Ind. 236; *Byrnes v. City of Cohoes*, 67 N. Y. 204.

In this instance the city collected the surface water by means of an artificial ditch, and carried it to a point where the means of escape provided was insufficient to carry it off. It is certainly the same in principle as to conduct, by means of a ditch

or gutter, water to a sewer of insufficient capacity to receive and conduct it away. If, in constructing the culvert, it was merely an error of judgment in not making it large enough, or in not constructing a sufficient number of culverts, still the appellees could not escape liability on account of error of judgment. This is squarely held in *City of Indianapolis v. Huffer*, 30 Ind. 235.

Before the construction of the bank and culvert by the railroad company, there were twenty-five blocks of adjacent territory with the natural drainage toward and over Ninth street. The means used to cause the water to flow as it did were artificial—the bank and the ditch or drain. In *City of New Albany v. Ray*, 3 Ind. App. 321, 29 N. E. 611, it was said: ⁴⁶⁷ "Where a city, by artificial means, collects a body of water, it must use reasonable care to provide an adequate outlet therefor, and, if it fails to do this, and an injury results to private property in consequence thereof, the city is liable for the damages."

In *Town of Monticello v. Fox*, 3 Ind. App. 481, 28 N. E. 1025, it was said: "A municipal corporation is not exempt from liability for damage accruing through its failure to provide means of drainage, where a necessity for the drainage has been created by the act of the corporation. Where, by a system of drainage made by it, a great body of water has been conducted to a place, and caused to accumulate there, the corporation is liable for failure to provide a way of escape for the water, so that it will not damage adjoining private property."

The point clearly decided by these cases is that it is the duty of a city, where it causes water to be collected, to furnish a sufficient outlet for its escape, and if it fails to do so, and injury results, it is liable for damages occasioned: See, also, *City of Valparaiso v. Ramsey*, 11 Ind. App. 215, 38 N. E. 875; *Martin v. City of Brooklyn*, 32 App. Div. 411, 52 N. Y. Supp. 1086, 4 Am. Neg. Rep. 721.

In the case of the *City of New Albany v. Lines*, 21 Ind. App. 380, 51 N. E. 346, it was held that a municipal corporation cannot, without liability, divert surface water from its natural course by an artificial channel, and thereby cause it to flow upon adjacent property. It was further held that it is the duty of a city to provide reasonably sufficient means of escape for the surface water, for the escape of which it has created the necessity, and that a failure to perform that duty will give a right to successive actions for recurring injuries to an adjacent owner of real estate.

The complaint before us shows that the city of Jeffersonville granted, by ordinance, the right of the railroad company to construct and maintain along and upon one of its streets an embankment upon which to lay its track. A condition imposed upon the railroad company by the grant was ⁴⁶⁸ to construct and maintain culverts of sufficient size and number to carry away the accumulation of water. This it failed to do. The city constructed a ditch or drain leading to the single culvert through the bank and under the track. The natural result of such drain was to collect the surface water within its channel, and conduct it therein to the point of outlet—the culvert. This must necessarily result in an accumulation of water at that point; and if the outlet was insufficient in size to carry it away, then the water would back up and overflow adjacent property. This is what occurred, and injury resulted to appellant's property. The combined acts of appellees were responsible for such injury, and, under the authorities, they are jointly liable.

Judgment reversed, and the court below is directed to overrule the demurrers to the complaint.

The Statute of Limitations does not begin to run against a land owner's right of action for the unlawful flowage of his land until he has been injured, and his action has accrued, notwithstanding the negligent structure and other acts causing the overflow may have been growing or working for a length of time beyond the period of limitation: *Note to St. Louis etc. Ry. Co. v. Biggs*, 20 Am. St. Rep. 177, 178; *Eels v. Chesapeake etc. Ry. Co.*, 49 W. Va. 65, 87 Am. St. Rep. 787, 38 S. E. 479.

A Public Nuisance will not be sanctified by time. The general rule is, that there can be no prescriptive right to maintain it: *North Point Irr. Co. v. Utah etc. Canal Co.*, 16 Utah, 246, 67 Am. St. Rep. 607, 52 Pac. 168.

A Municipality Causing Water to flow upon private property is answerable for resulting injuries: *Brunswick v. Tucker*, 103 Ga. 233, 68 Am. St. Rep. 92, 29 S. E. 701; *Wendel v. Spokane County*, 27 Wash. 121, 67 Pac. 576, post, p. 825, and cases cited in the cross-reference note thereto.

CASES
IN THE
SUPREME COURT
OF
IOWA.

MILLER v. EVANS.

[115 Iowa, 101, 88 N. W. 198.]

CRIMINAL LAW.—A court has no power to suspend sentence after it is pronounced, save for the purposes of an appeal. (p. 144.)

CRIMINAL LAW.—Failure of Officers to Enforce a Sentence of Imprisonment due either to delay in issuing the execution or in taking defendant into custody after it issues does not prevent his subsequent arrest and imprisonment. The time when a sentence is to be carried out is ordinarily directory merely, and forms no part of the judgment of the court. (p. 145.)

Habeas corpus to obtain release from custody of Anthony Miller, who was sentenced on November 22, 1899, to pay a fine of three hundred dollars, and to stand committed for ninety days unless such fine was sooner paid. The mittimus did not issue until January 2, 1900, and the sheriff delayed acting under it until February 22d of the same year. The trial court remanded the petitioner, and he thereupon appealed.

Heins & Heins, for the appellant.

No appearance for the appellee.

¹⁰² **LADD, J.** Though the petitioner was sentenced November 23, 1899, to pay a fine, and, on omission so to do, to stand committed to the county jail for a period of ninety days, mittimus was not issued until January 2, 1900, and the defendant not taken into custody by the sheriff until February 22d following, or after the term of his incarceration would have expired if begun on the day of judgment. He was present in court when sentence was pronounced, and remained in the county during the

entire period, interposing no obstacle to carrying out the sentence. There appears to have been no excuse whatever for the delay of the officer. Section 5443 of the Code requires that "when a judgment of imprisonment, either in the penitentiary or county jail, is pronounced, an execution, consisting of a certified copy of the entry thereof in the record book, must be forthwith furnished to the officer whose duty it is to execute the same, who shall proceed and execute it accordingly, and no other warrant or authority is necessary to justify or require its execution." It was undoubtedly the duty of the clerk to issue mittimus, and of the sheriff to execute the same promptly upon the rendition of judgment; but can it be said that the neglect of these officers shall defeat the very object of the prosecution—i. e., punishment for violation of the criminal laws? The right to suspend sentence after being pronounced is denied the courts of this state: *State v. Voss*, 80 Iowa, 467, 45 N. W. 898. And this seems now to be the prevailing rule: *Neal v. State*, 104 Ga. 509, 103 69 Am. St. Rep. 175, 30 S. E. 854; *In re Webb*, 89 Wis. 354, 46 Am. St. Rep. 846, 62 N. W. 177; *State v. Murphy*, 23 Nev. 390, 48 Pac. 628; *In re Markuson*, 5 N. Dak. 180, 64 N. W. 939. Contra: *Weber v. State*, 58 Ohio St. 616, 51 N. E. 116; *Fultz v. State*, 2 Sneed, 232; *State v. Crook*, 115 N. C. 763, 20 S. E. 514. See, also, *People v. Court of Sessions of Monroe Co.*, 141 N. Y. 288, 36 N. E. 386. Whatever justification the hardships resulting from the peculiar rules of the common law may have furnished for such a practice, all excuse for it disappeared with the enactment of statutes affording full opportunity for the correction of errors, and giving the courts a discretion apparently wide enough to meet the hardest cases. The authority "to grant reprieves, commutations and pardons, after convictions for all offenses, except treason and cases of impeachment," is by the constitution lodged in the governor; and an order by a court suspending judgment after being entered, save for purposes of appeal, is clearly obnoxious to the objection that it is an attempted exercise of power not judicial, but vested in the executive: Const., art. 4, sec. 16. But if petitioner's contention be accepted, the officers of the court may accomplish by delay that which the court itself is powerless to do. Aye, more; for, while the court could not postpone the penalty of the law denounced against the offender, its officers might by procrastination wholly obviate and prevent punishment. *In re Webb*, 89 Wis. 354, 46 Am. St. Rep. 846, 62 N. W. 177, relied on by appellant, is not precisely like the case at bar in its facts; for there the prisoner

was actually in custody, and when, at his request, the sentence was suspended, he was allowed his liberty. The order of suspension was adjudged to be in excess of the court's authority, and the term of imprisonment held to have begun eo instante upon the entry of judgment, and to have terminated ¹⁰⁴ at the end of the period fixed therein, although the prisoner had not been incarcerated an instant of that time. A like conclusion was reached in *re Markuson*, 5 N. Dak. 180, 64 N. W. 939. In both cases, however, this conclusion seems to have been treated as a necessary result of declaring the order suspending the sentence illegal. We are unable to discover any reason for allowing the convict to thus profit by a delay to which he has assented, or in which he has acquiesced without objection. The time at which the sentence is to be carried out is ordinarily directory only, and forms no part of the judgment of the court: *State v. Cockerham*, 24 N. C. 204; 19 Ency. Pl. & Pr. 480; *Ex parte Bell*, 56 Miss. 282; *Dolan's Case*, 101 Mass. 219; *Hollon v. Hopkins*, 21 Kan. 638. In the last case it was said that: "The time fixed for executing a sentence, or for the commencement of its execution, is not one of its essential elements, and, strictly speaking, it is not a part of the sentence at all. The essential portion of the sentence is the punishment, including the kind of punishment, and the amount thereof, without reference to the time when it is to be inflicted." It was also observed that "the only way of satisfying a judgment judicially is by fulfilling its requirements"; and, in *Dolan's case*, that "expiration of time without imprisonment is in no case an execution of the sentence." This cannot be waived, as here claimed, by the officers of the court, whose duties with respect to its judgments are purely ministerial. The time for its execution was not of the essence of the judgment, unless the prisoner, by demanding that it be immediately carried out, made it such. It was his duty to surrender himself and submit to the penalty of the law, as well as that of the sheriff to inflict it; and, by taking advantage of the neglect of the latter and of the clerk, he cannot avoid the punishment which his wrongdoing will be assumed to have justly required. In *Neal v. State*, 104 Ga. 509, 69 Am. St. Rep. 175, 30 S. E. 858, a sentence of six months' work in the chain-gang was ordered suspended. At a subsequent term of court, after the ¹⁰⁵ lapse of six months, it was ordered that the sentence be enforced. The prisoner contended that, as the order of suspension was illegal, the period of imprisonment began, in contemplation

of law, at the date the judgment of court was rendered. In the course of the opinion rejecting this view, after a discriminating investigation of the authorities, the court said: "Suppose a court in this state sentences a person convicted of criminal offense to work in the chain-gang for twelve months, without attempting to suspend the execution of the sentence, and the sheriff, in disregard of his duty, and on his own motion, immediately discharges the prisoner, and allows him to have unrestricted liberty for a year or longer; can it be held, after he has enjoyed twelve months of perfect but unlawful freedom, that he has, in contemplation of law, worked in the chain-gang for the full term for which he was sentenced? We apprehend not. What difference can it make whether the sheriff discharges the sentenced criminal unlawfully on his own motion, or discharges him unlawfully under a void order of the court?" In *Ex parte Vance*, 90 Cal. 208, 27 Pac. 209, the prisoner was sentenced to imprisonment until a fine was paid, and thereafter released by the sheriff without legal authority. When re-arrested after the lapse of the period fixed, he insisted that, as judgment had not been suspended, the term of his imprisonment had expired. But the court declared: "The act of the sheriff in releasing the petitioner was unauthorized, and the petitioner's departure from the jail to which he had been lawfully committed, without having been discharged in due course of law, was equally so, and was, in effect, a technical escape, from which he can derive no advantage. The time of the petitioner's absence from jail cannot be considered as having been spent in jail in satisfaction of the judgment which required his actual imprisonment." In *State v. Cockerham*, 24 N. C. 204, the prisoner had been sentenced to be imprisoned two calendar months from and after November 1st, but did not ¹⁰⁸ go to prison accordingly. Direction at a subsequent term of court, more than the period fixed later, that the judgment be executed, was upheld, as the time for the beginning of the sentence was directory only, and formed no part of the judgment: See *Sylvester v. State*, 65 N. H. 193, 20 Atl. 954; *McKay v. Woodruff*, 77 Iowa, 413, 42 N. W. 428. In principle, these authorities fully sustain our conclusion, and it follows that the petitioner was rightfully remanded to the custody of the sheriff, to be dealt with as commanded in the judgment of the court.

Affirmed.

A Court May Postpone the Execution of a sentence it has imposed in a criminal case only as an incident to the obtaining of a new trial or a review of the judgment: Neal v. State, 104 Ga. 509, 69 Am. St. Rep. 175, 30 S. E. 858. If it does by its order, after sentencing the accused to a term of imprisonment, purport to suspend such imprisonment until the further order of the court, it cannot, after the expiration of the term specified, direct his imprisonment, though during such term he was at liberty: In re Webb, 89 Wis. 354, 46 Am. St. Rep. 846, 62 N. W. 177. As to whether habeas corpus will lie to release a prisoner in case there is a delay in executing the sentence imposed upon him, see the monographic note to Koepke v. Hill, 87 Am. St. Rep. 193.

GIBSON v. TORBERT.

[115 Iowa, 163, 88 N. W. 443.]

SALE OF DANGEROUS ARTICLES—When Justifiable.—When a person of the age of discretion, and apparently in the possession of his mental faculties applies to a druggist for a designated drug, he, by implication, represents to the seller that he knows its properties and uses, and that he is a fit person to whom the sale thereof may be made, and, unless there is something connected with the transaction, or previously known to the seller, indicating that the would-be purchaser cannot safely be intrusted with the substance, a sale thereof to him may be made without explaining its properties and the manner in which it may be safely used or handled. (p. 151.)

NEGLIGENCE in the Sale of Phosphorus—What is not.—If a druggist receives a written order for phosphorus and sends it to the writer properly packed in water and labeled, such druggist is not guilty of negligence because he did not explain the properties of the phosphorus, nor the dangers of improperly using it, and he is not liable for injury sustained by the purchaser from the explosion of the phosphorus when taken from the water and dropped on the floor. It is not a new or dangerous substance with the qualities of which the general public is not acquainted. (p. 151.)

NEGLIGENCE—Selling Dangerous Article to an Illiterate Person.—The fact that the letter by which the writer ordered phosphorus to be sent to him by express by a druggist was badly spelled and poorly written is not equivalent to a notice that the writer is unacquainted with the properties of the article ordered, so as to render the druggist liable for injuries resulting to such writer from his ignorance of such properties, and his consequently taking the phosphorus out of the water in which it was sent and dropping a stick of it on the floor, from which an explosion resulted. (p. 152.)

Action to recover for physical injuries claimed to have resulted from the defendant's negligence. A demurrer to the complaint was sustained, whereupon the plaintiff appealed.

Bowen, Brockett & Albertson and Longueville & Kintzinger, for the appellant.

Lacy & Brown and Henderson, Hurd, Lenehan & Kiesel, for the appellee.

¹⁶⁴ SHERWIN, J. In his petition the plaintiff alleges that he is a man of middle age and of very limited education, and that at the time of the transaction in question he was, and always had been, ignorant of the character and properties of phosphorus. That the defendant was a wholesale druggist, dealing in phosphorus and possessed of scientific knowledge of, and was perfectly familiar with, its character and properties. That said drug in its commercial form is but little used, and its nature and properties are not generally known to the public. That ¹⁶⁵ in such form it is a highly drastic, corrosive, and deadly poison, and is highly explosive and combustible, being liable at all times when removed from water, "to explosion and spontaneous combustion, either by ignition from contact with fire, by the application of force, or from chemical changes effected by contact with air." That in fact it is a "most dangerous and deadly nuisance." "That having heard that said drug was employed by actors and stage managers as a harmless illuminant, and desiring to know more about it," he sent an order in writing to the defendant "for a small quantity thereof," in words and figures as follows:

"Iowa Falls, —4—3—97.

"W. H. Torbert Dubuque, Iowa.

"Dear Sur, Mr. Swortz Gave me your Address and advised me To Rite to you and that you would send me what I wanted as he had not Got it Will you Please send me 50c worth of Phos Phorus By express to Colect on Delever and if it works as I Think it will Thare will Bee A Big Demand for it Let me Know Pleas if you Have not got it whare I can Get it By Return male your Truley W. M. Gibson, Iowa Falls Iowa."

That said letter was in his own handwriting, and was poorly written with lead pencil. That in response thereto the defendant caused a glass bottle containing three sticks of phosphorus immersed in water to be shipped by express to plaintiff, labeled "Phosphorus," but without any other written directions or warning whatsoever accompanying it. That after receiving the package he removed the phosphorus from the bottle, and proceeded to examine and handle the same. "That, while holding two of said bars in his hands, by accident one of the bars

slipped from his hand and fell upon the carpet of the floor in his home." That, "on stooping to pick it up, it exploded, scattering spray and molten quantities of its substance upon his hand, which instantly burned, and at the same time ignited and exploded the bar which was being held in his other hand." "That defendant was fully aware of all said danger; that there was constantly an imminent probability that said drug would act ¹⁶⁶ as herein explained, under similar circumstances; and that such facts, and all its dangers, were unknown to the general public, and probably unknown to plaintiff."

An exhaustive research by the able counsel representing both sides of this case has failed to find in the text-books or in the adjudicated cases a case presenting facts exactly parallel to those in the case at bar. This action is not based upon the statute (Code, sec. 2593), which requires the labeling of certain drugs when sold; for phosphorus is not one of the drugs therein mentioned. It is a common-law action, alleging negligence in selling and delivering to a customer in the usual course of trade the identical thing ordered, properly labeled, without informing such customer of the dangerous properties of the substance so ordered and delivered. The cases cited pro and con furnish but little assistance in determining the question before us, for the reason that they were all decided on a different set of facts. They all recognize the general rule that where one person owes a legal duty to another, and fails to perform it, he is liable for the damage resulting proximately from his failure. We cannot notice in detail all of the authorities cited in support of the plaintiff's contention, but give the gist of the matter in each case. In *Osborne v. McMasters*, 40 Minn. 103, 12 Am. St. Rep. 698, 11 N. W. 543, a druggist's clerk sold a deadly poison without labeling it "Poison," as required by the statute. It is held that the proprietor was liable, both under the statute and at common law; but it does not appear from the opinion whether there was a mistake in filling the prescription or not. *Crowhurst v. Board*, 4 Ex. 5, is a case where a poisonous tree was permitted to grow in a cemetery, so that its branches extended over the fence into plaintiff's pasture, and "his horse ate of it and died." The defendants were held liable. *Kennedy v. Ryall*, 67 N. Y. 379, is a case where a ship was fumigated, and a portion of the substance used therefor (a deadly poison) left where it was afterward found and drank ¹⁶⁷ by a small child, resulting in its death. The master of the ship was held liable. *Elkins v. McKean*, 79 Pa. St.

493, is a case in which the manufacturers of illuminating oil branded it as bearing a fire test of 110° , when in fact it only tested 64° or 65° . In *Carter v. Towne*, 98 Mass. 567, 96 Am. Dec. 682, gunpowder was sold to an eight year old boy. And in *Dixon v. Bell*, 5 Maule & S. 198, a loaded gun was given to a girl thirteen or fourteen years old, and while in her hands it was discharged, injuring another. In *Schubert v. J. A. Clark Co.*, 49 Minn. 331, 32 Am. St. Rep. 559, 51 N. W. 1103, the plaintiff was injured by the breaking of a step-ladder upon which he was standing while at work. The ladder was constructed of rotten wood, which was concealed by paint and varnish. *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455, is an early case in this country, and is often cited, but it is a case in which a poisonous drug was falsely labeled. In *Wellington v. Downer Oil Co.*, 104 Mass. 64, the defendant sold dangerous oil, not safe for illuminating purposes, to a customer whom it knew had no knowledge of its dangerous character, and intended to sell it for illuminating purposes. *Bishop v. Weber*, 139 Mass. 411, 52 Am. Rep. 715, 1 N. E. 154, is a case where unwholesome food was sold. And *Davis v. Guarnieri*, 45 Ohio, 470, 4 Am. St. Rep. 548, 15 N. E. 361, *Fleet v. Hollenkemp*, 13 B. Mon. 219, 56 Am. Dec. 563, and *Brown v. Marshall*, 47 Mich. 576, 41 Am. Rep. 728, 11 N. W. 392, are all cases in which mistakes were made in putting up medicine. *Standard Oil Co. v. Tierney*, 92 Ky. 367, 36 Am. St. Rep. 595, 17 S. W. 1025, is a case where the company shipped naphtha over a railroad, the barrels being marked, simply, "Unsafe for illuminating purposes," while the waybill stated that it was "carbon oil." The conductor in charge of the train was injured by an explosion of the naphtha, and was allowed to recover: See, also, *Craft v. Parker, Webb & Co.*, 96 Mich. 245, 55 N. W. 812, 21 L. R. A., note, page 139. ¹⁶⁸ In some of the cases cited, language is used which is broader than the particular case under consideration called for, and which at first glance might be thought to support the plaintiff's contention in this case; but, as we have said, an examination of the cases themselves shows that such language is only general and not entitled to controlling weight as authority in this case. *Boston etc. R. R. Co. v. Shanly*, 107 Mass. 568, though not cited by counsel, is a case in which gunpowder manufacturers shipped over the plaintiff's road what was alleged to be a "new, dangerous, explosive, combustible, and inflammable compound, recently discovered and manufactured,

called by a new name, not generally known, now new in the market, and the qualities were and are not generally known, made in part of nitroglycerin itself an exceedingly dangerous explosive and combustible substance." This substance was shipped as "Dualin," and it was alleged in the declaration that not only was the plaintiff railroad company not notified of its dangerous character, but, on the contrary, it was assured that it was safe, and not of a dangerous nature. A demurrer to the declaration on the ground that it did not state a cause of action was overruled. It is well to notice here that the declaration charged that the substance was new, with a new name; that it was recently placed on the market; and that the plaintiff was informed that it was safe, and not of a dangerous character—averments not to be found in the petition in the case at bar. We believe that the true rule deducible from reason and from authorities is that when a person has reached the age of discretion, and who is apparently in the possession of his mental faculties, applies to a druggist for a certain drug, he represents to the dealer, by implication, at least, that he knows its properties and uses, and that he is a fit person to whom sale thereof may be made, and that unless there is something connected with the transaction, or something previously known to the seller, indicating that the would-be purchaser ¹⁶⁹ cannot safely be intrusted with the substance, a sale of the substance called for may be made without explaining its properties or the manner in which it may be safely used or handled, and that, under such circumstances, the seller is not liable in damages for injuries to the purchaser resulting from the improper use or handling of the article, no matter how little knowledge the purchaser may in fact have had of its properties, or of the manner in which it could not be safely used or handled. It appears clear to us that the vendor's legal duty to such a purchaser can go no further than to give him the identical substance he calls for. Let us now apply this rule to the facts in this case. Phosphorus is one of the elements of matter that was discovered more than two hundred years ago—in fact, its illuminating properties were discovered as early as 1680; and it has been used for different purposes to a limited extent ever since its discovery. Since 1835 its principal use has been in the manufacture of matches. For years this latter use has been a matter of common knowledge to children, even; and there are but few adults of ordinary observation or intelligence who are not familiar with this

use, and its peculiar quality of emitting light. It is also generally known to be a deadly poison when taken internally. It is contended, however, that the plaintiff's letter ordering phosphorus is so illiterate that it alone would convey to a man of ordinary care information that the plaintiff was not a suitable person to intrust the drug without specific warning as to its dangerous properties; but we cannot accept this construction of the letter, nor the inference sought to be drawn therefrom. On the contrary, we think the letter itself, with all its indications of illiteracy, was an assurance to the defendant, to a certain extent, at least, that the writer knew the substance he was ordering. It will not do to say that a man who may not be able to correctly compose or to correctly spell, or whose writing is poor, ¹⁷⁰ is unfit to be intrusted with dangerous substances; for some, at least, of the great inventive geniuses of the world have been deficient in all of these respects.

The claim that the demurrer was improperly sustained, because the letter should have been left for the construction of a jury, we cannot assent to, because we are of opinion that the court should say, as a matter of law, that it does not disclose facts which would require the defendant to explain to the plaintiff in detail the properties of phosphorus.

It is questionable whether the petition sufficiently charges the defendant with knowledge of the plaintiff's ignorance of the dangerous nature of phosphorus, and a demurrer only admits matter well pleaded; but even if there were no doubt on this matter, we would not reverse the case, because of our firm conviction that the plaintiff has no legal cause of action, taking his petition as a whole in connection with appellant's argument, which discloses that the only evidence of this fact is the inference which arises from the lack of public knowledge.

The judgment is affirmed.

One Who Sells an Explosive, such as gunpowder, to a child, knowing he is ignorant of its dangerous character, is responsible for injuries sustained by him in exploding it: *Carter v. Towne*, 98 Mass. 567, 96 Am. Dec. 682. As to the liability of druggists for selling and dispensing dangerous articles, see the monographic note to *Howes v. Rose*, 55 Am. St. Rep. 255-258. As to the liability of one selling gasoline without being labeled as required by statute, see *Ives v. Welden*, 114 Iowa, 476, 89 Am. St. Rep. 379, 87 N. W. 408. And as to the duty of the shipper and the carrier of explosives, see *Standard Oil Co. v. Tierney*, 92 Ky. 367, 36 Am. St. Rep. 695, 17 S. W. 1025.

SMITH v. AETNA LIFE INSURANCE COMPANY.

[115 Iowa, 217, 88 N. W. 368.]

INSURANCE—Accident—Death by, What Evidence Sufficient to Prove.—If it appears that a passenger on a railway train, intending to alight at a crossing, left his seat while the train was running, went to the steps, and, descending them, stood on the lower, holding the railing with both hands, and he was next seen acting as if he was going to step down another step, and next holding the railing with one hand, and being dragged, the jury is authorized to find that his resulting injuries were accidental. (p. 155.)

INSURANCE, ACCIDENT—Exposure to Unnecessary Danger. The Burden of Proof is on the defendant to show that an accident causing death resulted, in whole or in part, from voluntary exposure to unnecessary danger. (p. 155.)

INSURANCE, ACCIDENT.—Voluntary Exposure to Danger Means something more than negligence proximately contributing to the injury. The test seems to be, did the insured appreciate that, by doing the act, he was putting life and limb in hazard. (p. 155.)

INSURANCE AGAINST ACCIDENT.—Voluntary Exposure to Danger is not Proved by evidence tending to show that the insured stood on the steps of a moving train, holding on with both hands, and fell or stepped therefrom in the belief that he was stepping on a lower step, which in fact did not exist. (p. 155.)

INSURANCE, ACCIDENT.—One making preparations to leave a train at a place elsewhere than the depot, if the train should stop, is not guilty of a violation of law, and does not break the conditions of a policy of insurance exempting the insurer from liability for injuries sustained in acts in violation of law, nor does he violate the condition of the policy exempting the insurer from liability for injuries suffered by the insured while entering or leaving a moving conveyance. (p. 156.)

Action on a policy of insurance against accident. Verdict and judgment for the plaintiff, and the defendant appealed.

Dawson & Estey and E. A. Dawson, for the appellant.

Boies & Boies, for the appellee.

218 WATERMAN, J. Samuel E. Smith, who was a deputy sheriff of Black Hawk county, lost his life by stepping or falling from a rapidly moving train on the Illinois Central railroad as he was returning to his home in Waterloo, from a **219** trip to Independence, where he had been for the purpose of taking a patient to the hospital for the insane. The accident happened shortly after midnight of September 7, 1899. The first complaint made is that the evidence does not sustain the verdict, in this: The burden was upon plaintiff to establish that

Smith's death was the result of an accident, and the evidence does not so show. The instructions of the trial court placed the burden upon plaintiff of establishing that the death of the assured was "caused as alleged" (i. e., by accidental means), and we have, therefore, to determine whether she made any substantial showing in this respect. When he went upon the train at Independence, Smith entered the smoking-car, taking a seat and riding therein until reaching Waterloo. As the train entered that city, Smith left his seat and went out upon the platform. He had told a fellow-passenger that he intended to alight when the train stopped at the crossing of the Great Western railroad, as that would save him about three squares' walk in getting home. As a matter of fact, he left the train at a point ten hundred and forty-six feet before the Great Western crossing was reached, and while the train was running at least ten miles an hour. Two witnesses testify as to the manner in which he got off. He descended the steps and stood upon the lower one for just an appreciable space of time. It was quite dark. He was holding onto the railing with both hands. As he paused for an instant on this step, he was facing inward, as one witness says—toward the center of the car. In this position he left the train. After so leaving, he hung on to the railing with his left hand, and was dragged a short distance. One of the witnesses, a brakeman, says: "He seemed to me like a man who was going to step down on another step—as if he thought there was another step there." While the question in response to which this statement was made was objected to by defendant, it was general in character, calling upon the witness to say whether Smith appeared to jump or fall from ²²⁰ the train. No motion was made to strike the answer, and no assignment of error presents the question of the propriety of the court's action in receiving this testimony. Further, this witness stated that, in his opinion, Smith fell from the train. The record on this matter is the same as we have set out with relation to the last question and answer spoken of, except that there was a motion to strike out the answer. No assignment of error is predicated upon these rulings of the court. Under well-established rules, this evidence stands for our consideration. Taking the case thus made, and the jury were authorized in finding that Smith did not intend to alight until the train stopped at the crossing, and inadvertently did so, by attempting to descend to another step, which he supposed was below the one upon

which he was standing. If this was the case, his injury was accidental, within the definition of that term as heretofore given by this court, for it was the result of an event which took place without his foresight or expectation. It was an undesigned and unexpected happening: *Feder v. Iowa State Traveling Men's Assn.*, 107 Iowa, 538, 70 Am. St. Rep. 212, 78 N. W. 252.

2. The policy in suit did not cover accident or death resulting in whole or in part from voluntary exposure to unnecessary danger, and it is claimed on the part of appellant that Smith's death was so caused. The burden of proof was upon the defendant to establish the breach of this clause of the contract: *Follis v. United States Mut. etc. Assn.*, 94 Iowa, 435, 58 Am. St. Rep. 408, 62 N. W. 807; *Jones v. United States Mut. etc. Assn.*, 92 Iowa, 652, 61 N. W. 485; *Sutherland v. Standard Life etc. Ins. Co.*, 87 Iowa, 505, 54 N. W. 453. "Voluntary exposure to danger" means something more than negligence contributing to the injury. "The policy was, no doubt, intended to cover accidents, although the assured may have been guilty of negligence which approximately contributed to his injury": *Follis v. United States Mut. etc. Assn.*, 94 Iowa, 435, 58 Am. St. Rep. 408, 62 N. W. 807. The act which causes the exposure may be voluntary, yet the exposure may be involuntary: *Jones v. United States Mut. etc. Assn.*, 92 Iowa, 652, 61 N. W. 485; *Burkhard v. Travelers' Ins. Co.*, 102 Pa. St. 262, 48 Am. Rep. 205; *Equitable Acc. Ins. Co. v. Osborn*, 90 Ala. 201, 9 South. 869. ²²¹ The test seems to be, Did the assured appreciate that by doing the act he was putting life or limb at hazard? *Matthes v. Imperial Acc. Assn.*, 110 Iowa, 222, 81 N. W. 484. The evidence discloses that Smith was accustomed to traveling on railroad trains; that he had ridden on this train before. We cannot say, as matter of law, that his standing upon the car steps, holding to the rail with both hands, was a "voluntary exposure to danger," within the meaning of those words as we have defined them. This conclusion has entire support in the opinion of Mr. Justice Harlan, in the circuit court of appeals, in a case so like in its facts as to put it upon all fours with the one we are considering: See *Travelers' Ins. Co. v. Randolph*, 78 Fed. 754; also *Collins v. Bankers' Acc. Ins. Co.*, 96 Iowa, 216, 59 Am. St. Rep. 367, 64 N. W. 778. Indeed, it cannot be said, as matter of law, that deceased was even negligent in standing upon the platform of the car, holding to the railings as he did:

Sutherland v. Standard Life etc. Ins. Co., 87 Iowa, 505, 54 N. W. 453, and cases cited therein. The cases referred to by appellant can all be distinguished from the one at bar. Shevlin v. American Mut. Acc. Assn., 94 Wis. 180, 68 N. W. Rep. 866, is the one most relied upon. In that case the condition in the policy was against "exposure to unnecessary danger"; and the court bases its decision on the wording of the contract, and distinguishes the case from those in which the condition was against "voluntary" or "willful and wanton" exposure.

3. Defendant asked the court to instruct the jury that if Smith sustained the injuries which resulted in his death while he was leaving or attempting to leave the train, without the consent of the person in charge, at a place other than the established depot, he was guilty of a violation of law, and thus broke a condition of the policy, and their verdict should be for defendant. This was refused. Section 4811 of the Code is the provision sought to be embodied in this instruction. So far as it refers to an attempt to leave the train, it is erroneous. It is no violation of this section for one lawfully upon a train to make preparation ²²² with the intent to leave it at a place elsewhere than the depot if the train shall stop. So far as the instruction is confined to a case of actual alighting, the matter was fully covered in the charge given. While the court, in one paragraph, used the word "intentional" for the word "unintentional," it was in such a connection that it could not have been misunderstood, even if that paragraph had stood alone. There were, however, other instructions containing the same thought, expressed with clearness and precision.

4. It was a condition of the policy that the risk did not include or cover the act of entering or leaving "a moving conveyance using steam as a motive power, except cable and electric cars," etc., and a breach of this condition was set up as a defense. On this issue the trial court instructed as follows: "4. One of the defenses relied on by the defendant in this case is that the cause of death of the deceased, Samuel E. Smith, was his leaving, or trying to leave, a moving conveyance, using steam as a motive power, in violation of the terms and conditions of the policy in suit. Upon this question you are instructed that, in order to sustain its defense, the burden is upon the defendant to show by a fair preponderance of the credible evidence before you that the deceased, at the time of receiving the injury resulting in his death, was purposely leaving, or trying to leave, the car upon which he was riding, and

did not accidentally slip or fall from the steps upon which he was standing immediately prior to said accident. The fact that deceased was standing upon the platform and steps of the car immediately prior to said accident would not constitute a defense, under this clause of the contract, unless he was at such time purposely leaving or trying to leave such car and steps, and to alight therefrom." Certainly the burden was upon defendant to establish this defense: See authorities heretofore cited. It seems to be the thought of counsel for appellant that this instruction placed the burden on defendant, in the first instance, of showing that Smith's death was not accidental. ²²³ But the whole charge, when taken together, discloses clearly that plaintiff was obliged to make a prima facie case of accidental death; and then the burden shifted to defendant of showing that, by reason of the breach of some condition of the contract, it was not liable. It will be noticed that the instruction does not say that a failure to sustain such burden by defendant would warrant a recovery by plaintiff.

We have, in what has been said, covered the questions argued. We find no prejudicial error, and the judgment is affirmed.

Voluntary Exposure to Danger, within the meaning of an accident insurance policy, is a conscious or intentional exposure involving gross or wanton negligence: *Johnson v. London etc. Accident Co.*, 115 Mich. 86, 69 Am. St. Rep. 549, 72 N. W. 1115. The burden is on the insurer to show that an injury is due to such exposure: *Follis v. United States Mt. Acc. Assn.*, 94 Iowa, 435, 58 Am. St. Rep. 408, 62 N. W. 807; *Carnes v. Iowa State etc. Assn.*, 106 Iowa, 281, 68 Am. St. Rep. 306, 106 N. W. 281. The insurer, to absolve himself from liability, must not only allege and prove that the insured exposed himself to unnecessary danger, but also that he voluntarily exposed himself thereto: *Conboy v. Railway Officials etc. Assn.*, 17 Ind. App. 62, 60 Am. St. Rep. 154, 46 N. E. 363.

As to What is Death by Accidental Means, within the meaning of the law of accident insurance, see *Keefer v. Pacific etc. Ins. Co.*, 201 Pa. St. 448, 51 Atl. 366, 88 Am. St. Rep. 822, and authorities cited in the cross-reference note thereto; *Sargent v. Central Acc. Ins. Co.*, 112 Wis. 29, 88 Am. St. Rep. 946, 87 N. W. 796. Evidence of the cause of death is considered in the note to *Meadows v. Pacific etc. Ins. Co.*, 50 Am. St. Rep. 441-443.

MALLOW v. WALKER.

[115 Iowa, 238, 88 N. W. 452.]

WANT OF MENTAL CAPACITY is not Made Out where it appears that the party in question had sufficient mind to determine for himself what he wanted to do, and to carry out his purpose with reference to the disposition of the property owned by him, though he acts upon an antipathy suddenly formed. (p. 160.)

UNDUE INFLUENCE.—The Burden of Proving undue influence, for the purpose of having a will or deed set aside, is upon the party seeking that relief. (p. 161.)

UNDUE INFLUENCE, to Justify the Setting Aside of a Deed, must have been such as to overcome the will of the grantor, and to destroy, to some extent, at least, his free agency. It must further appear that the undue influence was exercised at the time the act referred to was done. (p. 161.)

UNDUE INFLUENCE.—An act is not due to undue influence though it resulted by reason of the influence of affection or a mere desire to gratify the wishes of another, if the free agency of the party is not impaired. (p. 161.)

UNDUE INFLUENCE is not Proved by showing that a disposition made by a parent of his property among his children is unreasonable or unjust. (p. 161.)

UNDUE INFLUENCE.—Parol Declarations of Intention contrary to a subsequent disposition of property do not alone prove undue influence. (p. 161.)

UNDUE INFLUENCE is not Presumed from the fact that the provision made is by a parent in favor of his child. (p. 161.)

UNDUE INFLUENCE.—Though it Appears that a Deed or Will was Executed at the Suggestion or Request of the Grantee or devisee, and was prompted by the influence which he acquired by business confidence or the showing of an affectionate regard, this does not prove undue influence, unless freedom of will has been in some way impaired or destroyed. (p. 162.)

WITNESS—Testimony Against a Deceased Person.—Under a statute prohibiting a person from being examined as a witness as to any transaction between him and a decedent against an executor, administrator, or next of kin, or other survivor, such person may be examined as to a conversation between decedent and another person occurring in the presence of the witness, but in which he did not participate. (p. 162.)

FRAUDULENT TRANSFERS.—A Conveyance in Consideration that the Grantee Will Support the Grantor, made when the latter had substantially no other property, is void as against his creditors. (p. 164.)

FRAUDULENT TRANSFERS.—The Administrator of an Estate may Maintain an Action against the grantee of the decedent to set aside a conveyance in fraud of the latter's creditors. (p. 164.)

CREDITORS' BILL.—Reducing Claims to a Judgment, When not Necessary.—It is not necessary, to support a suit by an administrator to set aside a conveyance by a decedent as in fraud of the latter's creditor, to show that they have reduced their claims to judgment. (p. 164.)

FRAUDULENT TRANSFERS are Valid, Except as Against the Claims of Creditors whom they tend to defraud, and when a suit is brought by an administrator of a decedent to set aside a conveyance made by him in fraud of his creditors, the grantee must be permitted to retain whatever remains after satisfying the creditors. (p. 164.)

Four several actions for the distribution of the estate of Gamaliel Walker, deceased, were consolidated and tried as one equitable action, the real parties in interest being John and Laura Mallow on the one side and Simon Walker on the other. Both sides appealed.

Holman & French and E. E. Hasner, for the appellant.

Cook & Leach, for the appellee.

²⁴⁰ **McCLAIN, J.** Gamaliel Walker died December 21, 1898, having attained the age of nearly eighty-two years, and leaving, as his estate, one forty-acre tract of land and a small amount of personal property. For some years prior to August, 1898, he had lived with his daughter, Laura Mallow, and her husband, John, both of them parties in these proceedings. In that month, however, he left the home of the Mallows, and went to live with his son, Simon (the appellant), and wife. While living with the Mallows, Gamaliel Walker had made a will devising the forty-acre tract of land above referred to, and which was then in possession of the Mallows, to his daughter, Laura, but immediately after leaving the home of the Mallows he withdrew this will from the office of the clerk of the district court, where it had been desposited, and destroyed it and thereafter executed to Simon a deed to the forty acres, in consideration of support for the balance of his life and two hundred dollars to be paid to a grandchild. Before the death of Gamaliel Walker, action of replevin was commenced in his name against John Mallow to recover possession of a promissory note executed by said John Mallow ²⁴¹ to Gamaliel Walker for four hundred dollars of borrowed money, which note it was alleged was wrongfully in the possession of said Mallow. Afterward Simon Walker, claiming under an assignment of the note from his father, was substituted as plaintiff in this action. Another action was brought by John Mallow against Gamaliel Walker to recover a balance of about twelve hundred dollars on an account for boarding the latter and two grandchildren, and for small sums of money advanced. In this action a counterclaim was interposed by the defendant therein for money advanced at various times to the plaintiff to an

amount, in the aggregate, of about two thousand eight hundred dollars. In this action J. C. Stevenson, as administrator of the estate of Gamaliel Walker, deceased, was, after the death of the latter, substituted as defendant. Laura Mallow, after the death of Gamaliel Walker, instituted a suit to have the deed to the forty acres from her father to Simon set aside as executed without sufficient mental capacity and under undue influence, basing her right of action on her claimed interest in the property to the extent of one-third as heir. Finally, Laura Mallow, then administratrix of her father's estate, brought suit as such administratrix to have the said deed set aside on the same ground, and on the further ground that it was fraudulent and void against creditors, and asked that the property be subjected to the payment of claims against the estate, including the claim of John Mallow for the balance of account above referred to. In this last suit John C. Stevenson, who was appointed administrator instead of Laura Mallow, was substituted as plaintiff.

From the foregoing very brief statement it is apparent that all the controversies involved in these four suits are really between John and Laura Mallow on the one side and Simon Walker on the other, and they will be treated as the adverse parties. It is also apparent that these controversies grow out of injured feelings, as well as injury to property ²⁴² rights, and that their solution depends to a considerable extent upon evidence of transactions with a person deceased, and upon the competency of the deceased, an old and infirm man, to make disposition of his property as between his heirs; and involve the further question whether such disposition was of his own free will or under undue influence. The conclusions we have reached are by no means entirely satisfactory to us, and yet they are adopted, in the belief that they approximate, as nearly as practicable under the law and the evidence, to the administration of abstract justice. We shall set them out as briefly as possible.

1. There is much evidence relating to the mental capacity of Gamaliel Walker at the time he destroyed his will and executed the deed to Simon. Without discussing it, we have to say that we agree with the conclusion of the lower court in the holding that want of mental capacity was not shown. Gamaliel Walker seems to have had sufficient mind to determine for himself what he wanted to do, and to carry out his pur-

poses with reference to the disposition of what property remained to him, and it is not for us to pass upon the reasonableness of such disposition. His antipathy to the Mallows, which seems to have been suddenly formed, may have been justified; and, even if unjustified, would not show mental incapacity. The owner of property, having the right to make such disposition of it as he sees fit, is not accountable to anyone with reference to the motive which lead him to act.

2. As to the claim that the deed was procured by Simon from his father by undue influence, it is sufficient to say that no evidence of any such undue influence appears. The burden of proof is on the party seeking to establish the fact of undue influence for the purpose of having a conveyance or a will set aside, and the evidence must show that the influence was such as to overcome the will of the grantor, and to destroy, to some extent at least, his free agency: *McIntire v. McConn*, 28 Iowa, 243 480; *Orr v. Pennington*, 93 Va. 268, 24 S. E. 928. And it must appear that the undue influence was exercised at the time the act referred to was done: *Herster v. Herster*, 122 Pa. St. 239, 16 Atl. 342, 9 Am. St. Rep. 95. "The fact that the act was done by reason of the influence resulting from affection or attachment, or a mere desire to gratify the wishes of another, if the free agency of the party is not impaired, does not affect the validity of the act": *Orr v. Pennington*, 93 Va. 268, 24 S. E. 928. The mere fact that the distribution made by a parent of his property among his children appears unreasonable or unjust will not alone establish undue influence, and prior declarations of an intention contrary to the subsequent disposition cannot be shown to establish undue influence in respect to the disposition finally made: *Muir v. Miller*, 72 Iowa, 585, 34 N. W. 429. And see *Pooler v. Cristman*, 145 Ill. 405, 34 N. E. 57. The mere fact that the provision complained of is one made as between a parent and child will not give rise to the presumption that it was the result of undue influence. While a conveyance from a child to a parent may sometimes be deemed presumptively invalid by reason of the influence which the parent is supposed to have over the child while occupying toward him a confidential relation, this does not apply when the conveyance is from the parent to the child: *Bauer v. Bauer*, 82 Md. 241, 33 Atl. 643; *McColloch v. Campbell*, 49 Ark. 367, 5 S. W. 590; *Chambers v. Brady*, 100 Iowa, 622, 69 N. W. 1015. Even if it appears that a deed or will is executed at the suggestion or request of the grantee or de-

visee, and is prompted by the influence which such person has acquired by business confidence, or the showing of an affectionate regard, this will not prove undue influence, unless the freedom of the will has been in some way impaired or destroyed: *Orr v. Pennington*, 93 Va. 268, 24 S. E. 928; *Chambers v. Brady*, 100 Iowa, 622, 69 N. W. 1015; *McCulloch v. Campbell*, 49 Ark. 367, 5 S. W. 590. The conveyance to Simon is not shown, therefore, to be invalid on account of undue influence.

²⁴⁴ 3. As to the claim of John Mallow for boarding Gamaliel Walker from 1892 to 1898, the facts, as far as we can discover them from the competent evidence, are substantially as follows: Some time prior to 1892 Gamaliel Walker and his wife went to live with John and Laura Mallow, under an arrangement by which Gamaliel Walker was to build an addition to the Mallow house, and furnish a part of the joint family expenses; and this arrangement was carried out until the death of Mrs. Walker in 1892. From that time on Gamaliel Walker continued to live with the Mallows, so far as it appears, without paying board, or furnishing supplies for the family, stating to various persons that the Mallows would be paid for his keeping. John Mallow testifies as to conversations between his wife and her father, and Laura Mallow as to similar conversations between her father and her husband, in which this arrangement was made quite specific, and the devise of the forty in controversy in this case to Laura Mallow was referred to as furnishing the compensation for board. The testimony of John and Laura Mallow, respectively, as to the conversation with Gamaliel Walker, is objected to as prohibited under section 4304 of the Code, because relating to personal transactions or communications with a person deceased; but each witness testifies to statements in conversations between deceased and the other, in the presence of the witness, and in which the witness took no part, and such testimony is competent: *Erusha v. Tomash*, 98 Iowa, 510, 67 N. W. 390; *Auchampaugh v. Schmidt*, 77 Iowa, 13, 41 N. W. 472. In the face of these direct statements of the witnesses we do not feel justified in excluding what they say. There is some testimony on the part of John Mallow with reference to conversations between himself and Gamaliel Walker which cannot be considered, but we think that from competent evidence it appears that it was the understanding of Gamaliel Walker that the Mallows should receive compensation in some form for his board, and John Mallow ²⁴⁵ is therefore entitled to be paid out of the es-

tate of Gamaliel Walker for the reasonable value of the board and care which the latter received. As bearing on this question, see, without further discussion, *Van Sandt v. Cramer*, 60 Iowa, 424, 15 N. W. 259; *Ridler v. Ridler*, 93 Iowa, 347, 61 N. W. 994; *Ridler v. Ridler*, 103 Iowa, 470, 72 N. W. 671; *McGarvy v. Roods*, 73 Iowa, 363, 35 N. W. 488. It is difficult, under the evidence to fix any value for the services thus rendered. During part of the time, undoubtedly, Gamaliel Walker was quite helpless by reason of old age and sickness, but it does not appear that this condition existed throughout the entire six years. For part of the time, no doubt, the charge of four dollars per week would be reasonable, but that is more than appears to have ordinarily paid for board in that neighborhood. We think that if we allow three dollars per week, we give all that the services were reasonably worth, and on this account John Mallow is entitled to one thousand and twenty dollars. We find no competent evidence that the estate of Gamaliel Walker is liable for the board of the grandchildren during that time, nor for sums of money claimed to have been advanced as charged in John Mallow's account. As a credit on this account, the estate is entitled to the rental value of the forty acres above referred to, which we find to have been sixty-five dollars per year—in all, three hundred and ninety dollars—leaving a balance of six hundred and thirty dollars. As to the counterclaim interposed by Gamaliel Walker when this claim was made against him, after he had left the Mallows, and was residing with Simon Walker, we do not find that the items are established by any competent evidence. There is much testimony relating to the estate of Gamaliel Walker's financial affairs during these years, and it is contended in behalf of the estate that he had considerable money and personal property when he lived with the Mallows, and that none of it remained at the time of his death; but we cannot infer, in the absence of any evidence, that this money and other personal property was turned over to either John or Laura Mallow, and, in the absence of any direct evidence of payment, ²⁴⁶ we must hold that there are no payments or offsets to be deducted.

4. While the conveyance of the land in question from Gamaliel Walker to his son, Simon, was not invalid, as we have already indicated, on the ground of mental incapacity or undue influence, yet inasmuch as Gamaliel Walker had practically no other property from which his debts could be paid, this conveyance was, in point of law, invalid as to his creditors. That a conveyance by

an insolvent in consideration of future support is void so far as it puts the property of the grantor out of the reach of creditors, is well settled: *Strong v. Lawrence*, 58 Iowa, 55, 12 N. W. 74; *Graham v. Rooney*, 42 Iowa, 567; *Woodall v. Kelly*, 85 Ala. 368, 7 Am. St. Rep. 57, 5 South. 164; *Stanley v. Robbins*, 36 Vt. 422; *Pease v. Shirlock*, 63 Vt. 622, 22 Atl. 661; *Davidson v. Burke*, 143 Ill. 139, 36 Am. St. Rep. 367, 32 N. E. 514. It is also well settled that the administrator of an estate may maintain an action against decedent's grantee to set aside a conveyance, if in fraud of decedent's creditors: *Cooley v. Brown*, 30 Iowa, 470; *Parker v. Flagg*, 127 Mass. 28; 1 *Woerner's American Law of Administration*, 630; *Wait on Fraudulent Conveyance*, secs. 112, 113. It is not necessary, in support of such an action, that the creditors have already reduced their claims to judgment: *Prentiss v. Bowden*, 145 N. Y. 342, 40 N. E. 13. The same principle is applicable to the transfer to Simon of the four hundred dollar note of John Mallow to Gamaliel Walker. In short, Simon Walker took the land and this note, which constituted the entire estate of Gamaliel Walker, subject to impeachment on the ground that the transfer was in fraud of the claim of John Mallow for board and care of Gamaliel Walker as above indicated. The conveyance of the land to Simon was, however, on condition that he execute a note to a grandchild of Gamaliel Walker for the payment of two hundred dollars, and this he ²⁴⁷ appears to have done. To that extent he has a claim on the property, provided, of course, anything is left after satisfying the debts. It does not follow, however, that the conveyance and transfer to Simon is to be entirely set aside, and the residue of the property, after the payments of these debts and the note to the granddaughter, is to be distributed as property of the estate. As to any such residue, the disposition made by Gamaliel Walker should be sustained, and Simon Walker's right thereto is to be upheld: *McLean v. Weeks*, 61 Me. 277; *Bank of United States v. Burke*, 4 Blackf. 141. The case will be remanded to the lower court, in order that such disposition be made of the various issues involved as to carry out the conclusions above announced.

As the findings of this court are materially different from those of the trial court, its decree must be reversed.

Undue Influence, as affecting the validity of a will, is considered in the monographic note to *In re Hess' Will*, 31 Am. St. Rep. 670-691. To avoid a will, undue influence must destroy the free agency of the

testator at the time and in the very act of making the will: *Englert v. Englert*, 198 Pa. St. 326, 82 Am. St. Rep. 808, 47 Atl. 940. The burden of proving such influence is upon the contestant. It cannot be presumed from a mere coincidence of opportunity to influence, but affirmative proof is required: *Schierbaum v. Schemme*, 157 Mo. 1, 80 Am. St. Rep. 604, 57 S. W. 526; *In re Shell's Estate*, 28 Colo. 167, 89 Am. St. Rep. 181, 63 Pac. 413. The presumption in favor of the validity of a will is not overcome by the fact that it unjustly discriminates in favor of a son of the testator: *Berberet v. Berberet*, 131 Mo. 899, 52 Am. St. Rep. 634, 33 S. W. 61. On presumptions of undue influence, see the monographic note to *Richmond's Appeal*, 21 Am. St. Rep. 94-104. On declarations of the testator as evidence of undue influence, see the note to *Jackson v. Kniffen*, 3 Am. Dec. 395-399; *Schierbaum v. Schemme*, 157 Mo. 1, 80 Am. St. Rep. 604, 57 S. W. 526; *Estate of Goldthorp*, 94 Iowa, 336, 58 Am. St. Rep. 400, 62 N. W. 845.

A *Fraudulent Conveyance* is valid as between parties: *Preston-Parton Mill Co. v. Dexter Horton & Co.*, 22 Wash. 236, 79 Am. St. Rep. 928, 60 Pac. 412; *Doster v. Manistee Nat. Bank*, 67 Ark. 325, 77 Am. St. Rep. 116, 55 S. W. 137. A conveyance in consideration of future support is fraudulent as to creditors: *Harris v. Brink*, 100 Iowa, 366, 69 N. W. 684, 26 Am. St. Rep. 578, and cases cited in the cross-reference note thereto.

FRICK v. FRITZ.

[115 Iowa, 438, 88 N. W. 961.]

CHATTEL MORTGAGE—Defective Description.—A mortgage of "101 yearlings and two-year-olds, branded with the letter F on left hip," without specifying the species of animals mortgaged, is good as between the mortgagor and the mortgagee, where the mortgage recites that it is for purchase money, and that the property is in possession of the mortgagor in the county designated. (p. 169.)

CHATTEL MORTGAGES.—Parol Evidence is Admissible for the purpose of identifying the property actually mortgaged, as where it serves to supply the description of the subject matter intended to be embraced by it, and not to change the description. (pp. 167, 168.)

CHATTEL MORTGAGE Defective in Description.—Notice of to Attaching Creditors.—Though the description in a mortgage of chattels intended to be embraced therein is too imperfect to impart notice to an attaching creditor, yet if he or his attorney is advised by the mortgagor that all of his cattle were mortgaged to Morris & Co., and an examination is thereupon made of the records, and the mortgage in question discovered, such creditor must be regarded as having actual notice of the mortgage and that the property imperfectly described is subject thereto. (p. 169.)

A **CHATTEL MORTGAGE** is not Void as Against Attaching Creditors because it incorrectly states that the steers covered thereby are all the steers owned by the mortgagor, if such creditor has ready means of ascertaining what animals are included in the mortgage. (p. 170.)

CHATTEL MORTGAGE.—*The Intermingling, After the Execution of a Mortgage, of the animals subject thereto with others cannot render it void for indefiniteness.* (p. 170.)

Action involving the right to the possession of personal property, the plaintiff claiming as attaching creditor of the defendant, and the interveners under mortgages executed by him. Judgment for the plaintiff, from which the interveners appealed.

Hubbard, Dawley & Wheeler, for the appellants.

Crisman, Trewin & Holbrook, for the appellees.

⁴³⁹ SHERWIN, J. July 20, 1898, the interveners sold and delivered to the defendant Fritz one hundred and one yearling and two-year-old steers at the agreed price of two thousand three hundred and twenty-three dollars, and took his note therefor, and a chattel mortgage on the cattle securing the same. The description of the cattle in the mortgage is as follows: "One hundred and one yearlings and two-year-olds, branded with the letter F on left hip." ⁴⁴⁰ The mortgage recites that it is given for the purchase price, that the property is unencumbered, and that it is in possession of the mortgagor in "Rodman, Palo Alto county, Iowa." It was properly recorded on the sixth day of August, 1898. On the twenty-first day of October, 1898, the interveners sold and delivered to Fritz two two-year-old steers and eighteen yearling steers for the agreed price of five hundred and thirty dollars; and took his note therefor, secured by a mortgage executed on the same day, and properly recorded on the first of November, 1898. The following is the description of the property given in the mortgage: "Two two-year-old steers and eighteen yearling steers, . . . being all of the property of the kind and description named now owned by me. Said property is free from all liens and encumbrances, and is now in my possession on the ——— quarter of section No. 20 of township No. 95, of range No. 31, Palo Alto county, state of Iowa." These mortgages were both recorded before the levy of the attachment in this case, and the plaintiff, through his attorney, had in his possession certified copies of both when the levy was directed and made. It is also clearly proven that the plaintiff's attorneys had been told by Fritz before the levy that his cattle were mortgaged for about all they were worth to Morris & Co., or to Morris and his partner. The name of the mortgagee given by Mr. Fritz is not clearly shown.

The first question for solution in this case is that of the valid-

ity of the first mortgage as between the mortgagor and the mortgagee, for it is evident that, if it is not a valid mortgage as between them, the controversy thereover between the mortgagee and the attaching creditor is at an end. No particular formality is necessary to make a mortgage valid as between the mortgagor and the mortgagee: *Glover v. McGilvray*, 63 Ala. 508; *Janes v. Penny*, 76 Ga. 797; *Wilmerding v. Mitchell*, 42 N. J. L. 476; *Merchants' etc. Sav. Bank v. Lovejoy*, 84 Wis. 601, 55 N. W. 108; *Whiting v. Eichelberger*, 16 Iowa, 422. Nor, ⁴⁴¹ as between them, need it be in writing: 5 Am. & Eng. Ency. of Law, 2d ed., 954, and notes.

The kind or species of yearlings and two-year-olds mentioned in the mortgage is not stated, and the question arises whether, as between the parties to the instrument, the kind of stock intended to be mortgaged by them may be shown by parol. It is the general rule, sustained by nearly all of the authorities, that parol evidence is admissible for the purpose of identifying the property actually mortgaged—in other words, it is not necessary that the property be so particularly described that it may be selected or pointed out by anyone from an inspection of the mortgage itself; and the cases are numerous in which a resort to parol evidence for the purpose of identification, even where the rights of third parties have been affected thereby, has been sustained. In this case, however, something more than the mere selecting or pointing out of the particular animals of a certain kind or species named in the mortgage is sought. Here the appellant seeks to show by parol what the species or kind is that the language of the mortgage was intended to cover. So far as the description goes, it is absolutely correct, and the admission of parol evidence as to the species of property intended to be covered thereby will not change or enlarge it so as to make it cover something not included in its terms, for it purports to cover a given number of head of some kind of stock. This is at once apparent upon examination of the instrument, so that such evidence would simply supply a missing word in the description of the stock. It is held that, "where parol evidence serves to apply the description of the subject matter intended to be embraced by it, and not to change the description, it is admissible": *Nichols v. Barnes*, 3 Dak. 148, 14 N. W. 110. The principle involved here is not different from that which permits identification of the property by parol evidence when the mortgage covers "all personal property of which the mortgagors are ⁴⁴² possessed," and the cases are many in which it is held that

such a mortgage is valid as to chattels in the possession of the mortgagor at the time of its execution, and that parol evidence is admissible to identify them: *Harris v. Allen*, 104 N. C. 86, 10 S. E. 127. It is a general rule, deducible from the authorities, that parol evidence is always admissible to identify mortgaged chattels: *Cobbey on Chattel Mortgages*, sec. 166, and cases cited therein. "Descriptions of property do not of themselves identify the property, but furnish the means or data from which the property is to be identified. . . . Descriptions of property in chattel mortgages are to be applied and interpreted in the light of the facts and circumstances known to the parties at the time the mortgage be made": *Cobbey on Chattel Mortgages*, sec. 155; 5 Am. & Eng. Ency. of Law, 2d ed., 964, and note 4; *Smith v. McLean*, 24 Iowa, 322. And see note, 14 Am. St. Rep. 239; *Barrett v. Fisch*, 76 Iowa, 553, 14 Am. St. Rep. 238, 41 N. W. 310.

The appellant contends that the omission to name the species of stock mortgaged creates a patent ambiguity in the instrument which cannot be explained or helped by parol evidence, and says that it might apply as well to "cattle, heifers, steers, bulls, horses, mules, sheep, swine or goats." We quite agree with the argument that it may be so applied when standing alone, but, such being the case, a latent ambiguity is created, and nothing more, for "if the language of the document, though plain in itself, applies equally well to more objects than one, evidence may be given both of the circumstances of the case and of statements made by any party to the document as to his intentions in reference to the matter to which the document relates": *Stephen on Digest Evidence*, 169; *Greenleaf on Evidence*, secs. 289, 290, 297; *Chambers v. Watson*, 60 Iowa, 339, 46 Am. Rep. 70, 14 N. W. 336; *Beach on Modern Contracts*, sec. 742; *St. Luke's Home for Indigent Christian Females v. Association etc. for Indigent Females*, 52 N. Y. 191, 198, 11 Am. Rep. 697. It is also competent to ⁴⁴⁸ prove the fact that the language "yearlings and two-year-olds" had a particular meaning, as used by the grantor, if such is the case; for, if he was in the habit of, or if in this particular case he used the term with a specific meaning, it may be shown by parol. That he did so use it is almost conclusively evidenced by the mortgage itself, because it says that it is given for the purchase price of the yearlings and two-year-olds, and that they are in his possession. We are clearly of opinion that parol evidence is competent to show the species of stock mortgaged in this instance, and that the mort-

gage must be held valid and enforceable as against the mortgagor: *Cobbe* on Chattel Mortgages, secs. 186-188; *Clapp v. Trowbridge*, 74 Iowa, 550, 38 N. W. 411; *Plano Mfg. Co. v. Griffith*, 75 Iowa, 102, 39 N. W. 214; *Luce v. Moorehead*, 77 Iowa, 367, 42 N. W. 328; *Smith v. McLean*, 24 Iowa, 322; *Call v. Gray*, 37 N. H. 428, 75 Am. Dec. 141; *Leighton v. Stuart*, 19 Neb. 546, 26 N. W. 198.

If valid as to the mortgagor, in what situation does it leave the attaching creditors? All of the steers bought of the interveners, except a few that died, were in the possession of Fritz, within a mile or so of Rodman at the time of the levy. If it be conceded that the mortgage of July 20th did not impart notice to the plaintiff because of insufficient description of the property, we still think the plaintiff had such actual notice and knowledge of the mortgage as to make it good as to him. In the first place, his attorney visited Mr. Fritz at his home, where the cattle were kept, and in an effort to secure the payment of the claims against him sued on herein asked him if he "didn't have some cattle that he could secure him on." He was then told by Mr. Fritz that his cattle were mortgaged for all they were worth to Morris & Co., or to Morris and his partner. In the second place, the attorney himself testifies that after his visit to Fritz, and before the levy, he made an examination of the records of Palo Alto county for the express purpose of finding what ⁴⁴⁴ chattel mortgages Fritz had on his property, and says that he found only the two mortgages involved in this case, both of which purported to have been given to the interveners by Fritz. It cannot be doubted, then, that the attorney had actual knowledge that Fritz's cattle were all mortgaged. He knew that the interveners were the mortgagees because no other mortgages appeared of record. He knew that the mortgagees were given for the purchase price of the stock, because they so recited; and he also knew where the stock could be found, because it was declared to be in the possession of the mortgagor. By the information received from Fritz and by the information received from the record of the mortgages the plaintiff's attorney was fully advised that all of the cattle then in the possession of Fritz were in fact mortgaged to these interveners. He was, then, in possession at least of such knowledge as would put him, as a reasonable man, upon inquiry: *Allen v. McCalla*, 25 Iowa, 464, 96 Am. Dec. 56. In the case of *Van Evera v. Davis*, 51 Iowa, 637, 2 N. W. 509, no actual notice was shown; and in *King v. Howell*, 94 Iowa, 208, 62 N. W. 738, where there was an absolutely false description,

so that an examination of the record showed a mortgage on property that did not exist, it is said that "a statement to the sheriff that such corn is mortgaged only gives actual notice of the mortgage as it is written," and, as applied to the facts in that case, it is correct.

It is argued that the mortgage of October 21, 1898, is not good as against this attachment, because it says that the steers covered thereby are all the steers owned by the mortgagor, when, as a matter of fact, he owned the one hundred and one others; but this statement could not have misled the plaintiff, for he had the ready means of finding out what part of the entire bunch of steers was covered by the second mortgage. It cannot be said that the mortgage is void for indefiniteness, because it covers a part of an unseparated herd, for when the mortgage was given this stock was separate from the rest, and was as distinct and as certainly ⁴⁴⁵ pointed out and identified as is possible in any case. The fact that they were afterward put with the other steers would not bring the case within the rule contended for under the holding in *Parker v. Chase*, 62 Vt. 206, 22 Am. St. Rep. 99, 20 Atl. 198; *Meredith v. Kunze*, 78 Iowa, 111, 42 N. W. 619, and other cases cited. The correct part of the description in this mortgage is sufficient, and, even without the actual notice had by the plaintiff, the false part of the statement will be rejected, and the mortgage held good: *Jones on Chattel Mortgages*, sec. 61; *Kenyon v. Tramel*, 71 Iowa, 693, 28 N. W. 37; *Smith v. McLean*, 24 Iowa, 322.

We think both of the mortgages under consideration good as against the attachment levied herein. This holding renders it unnecessary to consider the other matters complained of.

The judgment of the district court is reversed.

Justices Deemer and McClain joined in a dissenting opinion written by the latter. He claimed that the description of "101 yearlings and two-year-olds, branded with the letter F on left hip" was entirely insufficient, and that parol evidence was not admissible to prove what the parties supposed the mortgage to cover.

The Sufficiency of the Description of the subject matter of a chattel mortgage is considered in the monographic note to Barrett v. Fisch, 14 Am. St. Rep. 239-247. As to the description of mortgaged livestock, see, also, *First Nat. Bank v. Ragsdale*, 158 Mo. 668, 81 Am. St. Rep. 332, 59 S. W. 987; *Oxsheer v. Watt*, 91 Tex. 124, 66 Am. St. Rep. 863, 44 S. W. 466; *Avery v. Popper*, 92 Tex. 337, 71 Am. St. Rep. 849, 49 S. W. 219, 50 S. W. 122; *State Bank v. Felt*, 99 Iowa, 532, 61 Am. St. Rep. 253, 68 N. W. 818; *Huse v. Estabrooks*, 67 Vt. 223, 43 Am. St. Rep. 810, 31 Atl. 293; *Andregg v. Brunskill*, 87 Iowa, 351, 43 Am. St. Rep. 388, 54 N. W. 135. The description in a chattel mortgage

is sufficient, if it will enable third persons to indentify the property when aided by such inquiries as the instrument suggests: *Reynolds v. Strong*, 10 N. Dak. 81, 88 Am. St. Rep. 680, 85 N. W. 987. Parol evidence is admissible to identify the property: *Reinstein v. Roberts*, 34 Or. 87, 75 Am. St. Rep. 564, 55 Pac. 90; note to *Barrett v. Fisch*, 14 Am. St. Rep. 239.

TOLERTON & STETSON CO. v. ROBERTS.

[115 Iowa, 474, 88 N. W. 966.]

MORTGAGES—Application of Proceeds of, When may be Controlled by the Mortgagee.—If a mortgage is given to secure several notes, upon some of which there are indorsers or sureties, the mortgagee is entitled to apply any moneys received from the mortgaged property on its sale to the payment of indebtedness not otherwise secured. (p. 172.)

MORTGAGE—Application of Payments.—When payment on a mortgage is the result of compulsion, its application is not to be governed by the rules governing voluntary payments. (p. 172.)

MUTUAL MISTAKE OF LAW with reference to the manner in which the proceeds of mortgaged property will be applied in the event of its foreclosure does not entitle a party to relief, nor constitute a sufficient reason for not applying such proceeds as the law directs. (p. 174.)

Suit to foreclose a chattel mortgage given by the defendant M. J. Roberts to secure the payment of notes executed by him and his cosureties. F. H. Plumb intervening, sought to have the proceeds of the mortgaged property applied to the satisfaction of certain of the notes on which he was a surety, and which matured prior to the notes on account of which the plaintiff sought to foreclose. The trial court granted the relief prayed for by the intervener, and the plaintiff appealed.

J. A. Berry and D. M. Kelleher, for the appellant.

William Haxlett, for the appellees.

475 **McCLAIN, J.** Plaintiff, as creditor of the A. S. Roberts Shoe and Grocery Company, which had made an assignment for the benefit of creditors, purchased from the assignee a stock of goods belonging to the company and resold the same to defendant M. J. Roberts, receiving part payment in cash, and the notes secured by the chattel mortgage in this suit for the balance of the purchase price, which was made up of four hundred dollars, balance after applying the cash payment to the amount

which plaintiff had paid for the stock, and the indebtedness of the A. S. Roberts Shoe and Grocery Company to plaintiff. By this transaction the plaintiff was attempting to secure payment for what it had advanced in the purchase of the stock and its indebtedness against the former company. On the notes, which represented the four hundred dollars unpaid balance of the money paid out by plaintiff in the purchase of the stock, and which were the first notes falling due secured by the chattel mortgage, plaintiff also secured the signature of the intervener. Of the notes on which intervener was security, three remain in whole or in part unpaid, as do also a considerable number of notes, also secured by the mortgage, which were not signed by intervener. Plaintiff in the action, as originally brought sought to foreclose its mortgage and apply the proceeds of the mortgaged property to the payment of the notes not signed by intervener, and intervener, by his intervention, attempts to compel plaintiff to apply the proceeds ⁴⁷⁶ of the mortgaged property first to the satisfaction of the notes on which intervener is liable as surety. Aside from any agreement between the parties, intervener is not entitled to have the proceeds of the mortgaged property first applied in satisfaction of the notes on which he is surety, even though in order of maturity they precede the other note secured by the mortgage. A court of equity will allow the mortgagee to first apply the proceeds to the satisfaction of indebtedness not otherwise secured, thus realizing the full benefit of the additional security, if the proceeds of the mortgaged property are not sufficient to satisfy the entire debt: *Small v. Older*, 57 Iowa, 326, 10 N. W. 734; *Hanson v. Manley*, 72 Iowa, 48, 33 N. W. 357; *Citizens' Bank v. Whinery*, 110 Iowa, 390, 81 N. W. 694; *Shellabarge v. Binns*, 18 Kan. 345; *First Nat. Bank v. Finck*, 100 Wis. 446, 76 N. W. 608; *Schuelenburg v. Martin*, 2 Fed. 747; *Nichols v. Knowles*, 17 Fed. 494; *Jones on Chattel Mortgages*, secs. 638, 639. While the mortgagor in making payments on the indebtedness covered by the mortgage may, no doubt, direct application of payments as he sees fit, if he does not do so a court of equity will adjust the application of the proceeds of the mortgaged property on foreclosure in accordance with its own notions of justice, and the mortgagor cannot control such application: *United States v. Kirkpatrick*, 9 Wheat. 720, 737; *Field v. Holland*, 6 Cranch, 8, 28; *Lazarus v. Freidheim*, 51 Ark. 371, 11 S. W. 518; *Applegate v. Koons*, 74 Ind. 247; *Fairchild v. Holly*, 10 Conn. 175, 184; *Robinson v. Doolittle*, 12 Vt. 246. Where the payment is the result of com-

pulsion, its application is not to be governed by the rules which govern voluntary payments: *Armstrong v. McLean*, 153 N. Y. 490, 47 N. E. 912; *Orleans Co. Nat. Bank v. Moore*, 112 N. Y. 543, 20 N. E. 357, 8 Am. St. Rep. 775. The last two cases seem to hold that under such circumstances the proceeds of the property should be applied pro ⁴⁷⁷ rata to the notes secured, without regard to priority of maturity, and without regard to other security which the creditor may have for some of such notes; but the right of the mortgagee to have the proceeds applied to the notes not otherwise secured, in preference to those on which he has other security, has been fully recognized by this court, and we see no occasion to change the rule which we have already adopted on this subject.

These are the principles which must control in the decision of this case, and they are not seriously controverted by the intervener. But he contends that when the notes were executed, a collateral oral agreement was entered into between him and plaintiff that the mortgage security should be held first for the payment of the notes on which he was surety, and that this agreement must control in the disposition of the proceeds of the mortgaged property. We will not follow counsel in the discussion of the question whether the effect of the mortgage can thus be controlled by a collateral oral agreement, for we think that no such agreement was made. It appears that there was some conversation between the representative of plaintiff and the intervener to the effect that intervener, as surety on the first series of notes, was secured by the mortgage. In a sense, this was the result of the mortgage itself; for the plaintiff would be required to satisfy the entire indebtedness, including the first series of notes, out of the proceeds of the mortgaged property, if practicable. It was also true that the probability of the payment of the first series of notes, on which intervener was surety, was greater than that of the notes subsequently falling due; and this is all that was probably intended to be stated by plaintiff's representative. But even if, as claimed, the representative of plaintiff stated to the intervener that these "were the first notes, and they would be paid from the first part of the stock," this statement, in the connection in which it was used, was plainly a statement with reference to his understanding ⁴⁷⁸ of the law, and not an agreement intended to vary the legal effect of the mortgage. It seems to have been assumed (erroneously, of course) by both the representatives of plaintiff and the intervener that in case of foreclosure the

proceeds would, as matter of law, be applied in this way; but, as we read the record; the testimony of intervener himself does not show that either party supposed that he was entering into a definite collateral agreement to vary the legal effect of the provisions of the chattel mortgage. It is clear, without citation of authorities, that a mutual mistake of law with reference to the effect of the transaction would not entitle the intervener to any relief. We must, therefore, hold that the plaintiff had the right to foreclose his chattel mortgage as to the notes not signed by intervener as surety, and apply the proceeds of the property to the satisfaction of those notes, without regard to the payment of the notes on which intervener was surety, though, of course, if any surplus remains after the payment of the notes not otherwise secured, such surplus must be applied to the notes signed by intervener, leaving him liable only for any unsatisfied balance. Intervener was therefore not entitled to the relief asked in his petition, and his intervention should have been dismissed.

Reversed.

A Mortgagee is Bound to Apply the Proceeds of a sale of the mortgaged property to the mortgage debt, without any direction to that effect from the debtor: Montague v. Stelts, 37 S. C. 200, 34 Am. St. Rep. 736, 15 S. E. 968; Boyd v. Jones, 96 Ala. 305, 38 Am. St. Rep. 100, 11 South. 405. When there are several mortgage notes, the proceeds must be distributed among the different holders, irrespective of the dates of their maturity or of their assignment: Penzel v. Brookmire, 51 Ark. 105, 14 Ark. 23. The right of a creditor to apply a payment made by his debtor to one claim rather than another is confined to cases of voluntary payment. And moneys realized from a foreclosure sale are not voluntary payments: Orleans County Nat. Bank v. Moore, 112 N. Y. 543, 8 Am. St. Rep. 775, 20 N. E. 357.

DOWNING v. NICHOLSON.

[115 Iowa, 493, 88 N. W. 1064.]

WILLS.—A Devise to Nephews does not Include grandnephews, unless there is something in the context to show that the testator intended to include them, or there is such an ambiguity as to authorize extrinsic evidence for the purpose of showing that the grandnephews were intended to be included. (p. 176.)

WILLS.—Devise to a Class—Construction of.—Since a will speaks from the date of the testator's death, the members of a class, where there is a devise to a class, must, prima facie, be determined upon the death of the testator. If, however, the will indicates a contrary intent, that intent will be adopted and given effect. (p. 177.)

WILLS.—Devise to a Class, Whether Affected by Statute Providing that Heirs of a Deceased Devisee May Inherit His Share.—As a general rule, a statute providing that if a devisee dies before the testator, his heirs inherit the property, unless a contrary intent appears from the will, applies to devises to a class as well as to devises where the devisees are specially named. (p. 179.)

WILLS.—A Devise to a Class, One of the Members of Which is Dead When the Will is Executed, cannot operate for the benefit of his heirs, though the statute of the state declares that if a devisee dies before the testator, his heirs shall inherit the property devised to him, unless, from the terms of the will, a contrary intent is manifest. Therefore, a devise to the testator's nephews and nieces cannot benefit a son of a niece who died long before the will was made. (p. 180.)

Action by John Downing, grandnephew of John Nicholson, seeking to be declared a devisee under the will of the latter. Judgment in favor of the plaintiff, and the executor appealed.

D. J. Murphy, for the appellant.

W. S. Hart, for the appellee.

⁴⁹⁴ **DEEMER, J.** John Nicholson died testate June 2, 1898. His will was executed May 19th of the same year. This will made certain bequests to relatives and others, and contained the following residuary clause: "After paying all the foregoing amounts, I give and bequeath the balance of my property to be divided equally between all my nephews and nieces." John Downing, the applicant herein, is a son of Mary Fitzpatrick, nee Nicholson; and Mary Fitzpatrick was a daughter of Michael Nicholson, a brother of the deceased. Mrs. Fitzpatrick, applicant's mother, died June 15, 1883, which, as will be observed, was long prior to the time John Nicholson made his will. John Downing, who is a grandnephew of the deceased, claims that he is entitled to take, under the residuary clause of the will, the share his mother would have received, had she out-

lived the testator. This clause devises the remainder of his property to testator's nephews and nieces as a class, and applicant is not one of that class. His claim, however, is that he is a substituted legatee, and as such is entitled to the share his mother would have received had she outlived the testator. A devise to nephews will not include grandnephews unless there be something in the context which shows that testator intended to include them, or unless there be such an ambiguity as authorizes extrinsic evidence for the purpose of showing that grandnephews were intended to be included. The case was decided by the trial court on the pleadings, and the facts we have cited are the only ones admitted ⁴⁹⁵ by the parties. True, something is said in the petition about the intention of the testator; but this is denied in the answer, and therefore cannot be treated as a fact in the disposition of the case. The proposition of law announced is too plain for controversy, and we need only cite in its support *In re Woodward*, 117 N. Y. 522, 23 N. E. 120, and cases therein cited. Applicant practically concedes this rule, but he relies on section 3281 of the Code, which reads as follows: "If a devisee die before a testator, his heirs shall inherit the property devised to him, unless from the terms of the will a contrary intent is manifest." The mischief this statute was enacted to cure was the common-law rule to the effect that a devise to one who dies before the death of the testator lapses: *McMenomy v. McMenomy*, 22 Iowa, 148. Nearly every state in the Union has adopted statutes similar to this, although few are as comprehensive. Some of them apply only to cases where the original beneficiary was a child or other lineal descendant of the testator; some to cases where the beneficiary is a child or other relative, and dies leaving issue surviving the testator (and in some of the states of this group the statute applies only to certain classes of relatives, who are clearly pointed out by the statute); and some to all cases, no matter what relation the beneficiary is to the testator, or whether the beneficiary leaves descendants or not: See statutes and cases cited and referred to in 18 Am. & Eng. Ency. of Law, 755, 756 et seq. The remedy for this mischief of the common law was first adopted in this state with the code of 1851, which was in the same language as the statute under consideration, save that in place of the word "property" the word "amount" is used. Section 2319 of the Revision is a copy of section 1287 of the Code of 1851, and this same language is carried into section 2337 of the Code of 1873. For more than fifty years it has been the policy of this state to prevent lapses where a devisee dies before the death of the tes-

tator, and this has ⁴⁰⁶ been done by the use of the broadest and most comprehensive language. We are now, for the first time, called upon to determine whether or not this section applies to a devise to a class, and, if so, whether or not it applies to such devisees when one of that class is dead at the time testator made his will; and this without the aid of other extrinsic evidence, save such as identifies the persons belonging to the class, and identifies the claimant as a grandnephew of the testator. On entering this field, we, as usual, find quite a number of conflicting decisions, and are again reminded that it seems almost impossible to write a statute in language so clear that it may not be the subject of controversy.

Since a will speaks from the day of the testator's death, the members of the class, where the devise is to a class, are *prima facie* to be determined upon the death of the testator: *Ruggles v. Randall*, 70 Conn. 44, 38 Atl. 885; *Richardson v. Willis*, 163 Mass. 130, 39 N. E. 1015; *Buzby v. Roberts*, 53 N. J. Eq. 566, 32 Atl. 9. But this is not an unyielding rule, even at common law. The will itself may indicate a contrary intent, and if that be so this intent will be adopted and enforced: *In re Swenson's Estate*, 55 Minn. 300, 56 N. W. 1115; *Bailey v. Brown*, 19 R. I. 669, 36 Atl. 581. Under the common-law rule, the members of the class to whom testator left his residue estate would be determined upon the day of his death; and, as applicant herein is neither a nephew nor a niece, he would be excluded. Applicant's counsel contend, however, that the statute which we have quoted modifies this rule to this extent: that, although the members of the class are to be determined as upon the day of the testator's death, yet, as the applicant is an heir of one of that class, who would have taken under the will had his mother survived, he is entitled to her share, and that the decree of the trial court, so holding, is correct. Some of the cases hold that the general common-law ⁴⁰⁷ rule with reference to gifts to a class is not affected by these statutes, for the reason that they are only intended to apply where something is given by will to one who dies before the testator, and have no application to gifts to a class, where the gift is, in legal effect, only to the members of that class in existence at a designated time: See *In re Harvey's Estate*, [1893] 1 Ch. 567; *Martin v. Trustees of Mercer University*, 98 Ga. 320, 25 S. E. 522. This is also the rule in England: *Olney v. Bates*, 3 Drew. 319; *Browne v. Hammond*, Johns. & J. 210. But in other states these statutes are held applicable to gifts to a class as well as to indi-

viduals: *Howland v. Slade*, 155 Mass. 415, 29 N. E. 631; *Bray v. Pullen*, 84 Me. 185, 24 Atl. 811; *Strong v. Smith*, 84 Mich. 567, 48 N. W. 183; *Parker v. Leach*, 66 N. H. 416, 31 Atl. 19; *In re Bradley's Estate*, 166 Pa. St. 300, 31 Atl. 96; *Jones v. Hunt*, 96 Tenn. 369, 34 S. W. 693; *Wildberger v. Cheek*, 94 Va. 517, 27 S. E. 441. The numerical weight of authority seems to favor this rule, although it also will yield to the intent of the testator as found in the context of the will, or as shown by competent and legitimate evidence: *White v. Massachusetts Institute*, 171 Mass. 84, 50 N. E. 512; *Bigelow v. Clap*, 166 Mass. 88, 43 N. E. 1037; *Almy v. Jones*, 17 R. I. 265, 21 Atl. 616. The reason for this general rule appears to be that, as the statute is remedial in character, it should receive a liberal construction, so as to advance the remedy and suppress the mischief; that wills are presumed to be drawn with reference to existing laws, and that in arriving at a testator's intent we must presume that he had knowledge of the law, and drafted his will accordingly; that in gifts of the class in question a testator is presumed to treat all members of the class as surviving, although some of them be dead, and that, in the absence ⁴⁹⁸ of other evidence, this presumption will be conclusive; and that there is no substantial difference between a gift to all of a class and a gift to each member thereof, naming them. Where there is such conflict in authority, much may be said in support of either rule. Despite the temptation, we will not enter into a further discussion of the matter, but content ourselves with saying that we prefer the doctrine announced by the greater number of the cases as a rule of general application, but that, like all other rules on the subject, it must yield to the intent of the testator when that can be ascertained; for that is the polar star of all inquiry in such cases: *Daboll v. Field*, 9 R. I. 266.

With these rules settled, we are now brought down to the pivotal point in the case, to wit, Does the statute apply to a case where the devise is to a class, one of the members of which is dead at the time the will was executed, so that the heirs of the deceased member take by substitution or representation? Here, again, there is a decided and irreconcilable conflict in the case. Holding to the affirmative of the proposition are *Bray v. Pullen*, 84 Me. 185, 24 Atl. 811; *Wildberger v. Cheek*, 94 Va. 517, 27 S. E. 441; *Winter v. Winter*, 5 Hare, 306; *Moses v. Allen*, 81 Me. 268, 17 Atl. 66; *Jamison v. Hay*, 46 Mo. 546; *Chenault v. Chenault*, 88 Ky. 83, 9 S. W. 775. On the other hand, stat-

utes to prevent lapses are held not to apply where the supposed devisee is dead at the time the will is made: *White v. Massachusetts Institute*, 171 Mass. 84, 50 N. E. 512; *Billingsley v. Tongue*, 9 Md. 575; *Lindsay v. Pleasants*, 39 N. C. 320; *Almy v. Jones*, 17 R. I. 265, 21 Atl. 216; *Tolbert v. Burns*, 82 Ga. 213, 8 S. E. Rep. 79. We cannot take the time or space necessary to review these authorities. Some of them were decided on facts indicating the testator's intent to be in accord with the statutory construction, and at least one on a statute which provided ⁴⁹⁹ that the issue of a devisee who is dead at the time of the making of the will shall take the property given to him. We do not favor any arbitrary rule with reference to this matter, preferring to leave each case to be determined on its own peculiar facts. We may say, however, that at common law a legacy or devise to a person who was dead at the time of the making of the will was void, or, as some cases put it, lapsed. And it is only perforce of a somewhat strained construction of language that statutes similar to the one under construction are held to modify this rule. In Kentucky, there is an express statute which does so: See cases heretofore cited. And we understand Tennessee has a like statute: See *Dixon v. Cooper*, 88 Tenn. 177, 12 S. W. 445. This general rule also obtained even where the testator knew that the donee was dead: *Dildine v. Dildine*, 32 N. J. Eq. 78. If a deceased beneficiary is specifically named in the will, this, perhaps, is a sufficient indication that the testator intended his heirs to take, under the statute before quoted, as substitutional or representative devisees. But where the gift is to a class, of which there are many members, it is reasonable to suppose that the testator had in mind only those of that class who were living at the time he made his will. To apply the rule to the instant case, when testator made his will he had several nephews and nieces living. He also had at least one grandnephew, whose mother had been dead for more than ten years. In the residuary clause of his will he devised his remaining property to his "nephews and nieces," share and share alike. Did he intend by this description to give any part of it to this grandnephew? Surely not; for it would have been easy to include him if he had so desired. Taking the will by its "four corners," and reading it in the light of the admitted facts, we hardly think one unversed in the law would say that testator intended to include applicant in the class described as "nephews and nieces." If he ⁵⁰⁰ had intended to include the grandnephew, we think it more likely that he would have

named him. Nephews and nieces are here the primary devisees. Nothing whatever is given to their issue, except as they may be substituted under the statute. In order to claim under the will, this substituted legatee must point out the original legatee in whose place he would stand. At the date of the will none but living nephews and nieces of the testator could have taken. the issue of the one who was dead at that time can show no object of substitution, and to give him an original legacy would be, in effect, to make a new will for the testator. Of course, if the proposed legatee or devisee is living at the time the will is made, and subsequently dies before the death of the testator, a different intent is manifest, which will be given effect in virtue of the statute under which applicant claims. But where, as in this case, the gift is to a class, it is perfectly clear that testator had in mind only those members of the class who were then in existence. This conclusion is not in harmony with some of the cases we have cited, which hold that it makes no difference whether the devise is to a class or to designated beneficiaries, but we think that in arriving at the testator's intent there is a manifest difference. In the one case there is a devise to a particular person, showing an intent that that person or his heirs are the objects of his bounty, while in the other there is a devise to all of a class, and not to one of a different class, who is in no manner referred to in the will. Mrs. Fitzpatrick was never a devisee under the will, for she was dead and incapable of taking when the will was executed. True, her son was living; but that the testator intended to exclude him is manifest from the fact that he makes no mention of him by name, nor is he included in the class which is to take the residuary estate. The primary rule in the construction of all wills is the intent of the testator. When this is ascertained, almost all arbitrary and judge made rules will yield, and the intent prevail. The statute in ⁵⁰¹ question is based on the assumption that the testator would prefer his estate go to the legatee's descendants rather than to have it lapse. And it was not intended, we think, to apply to a case like this, where the persons whom he intended to take are clearly pointed out as a class. There was no devise in this case which would lapse, unless we arbitrarily say that he intended a part of his estate to go to one whom he knew to be dead when he made his last will and testament. Although it has been a difficult task to pioneer our way through the conflicting authorities which have been cited by counsel, and others which we have discovered on an in-

dependent investigation, we reach the quite satisfactory conclusion that the applicant is not entitled to take under the will, and that the court was in error in declaring him a beneficiary on the pleadings as they stood at the time the motion for decree was submitted.

It follows that the decree must be reversed.

If a Will Directs a Gift to a Class, the members thereof are ordinarily to be ascertained at the time of the testator's death. A will may, however, speak from the date of its execution, in which case the members of the class who take will be determined at the time of the making of the will: See the monographic note to *Thomas v. Thomas*, 73 Am. St. Rep. 414, on gifts to a class.

McCLURE v. DEE.

[115 Iowa, 546, 88 N. W. 1093.]

HEIRS—Liability for the Debts of an Ancestor.—By the common law an heir or devisee was not liable for the breach of a covenant unless expressly bound, but this rule did not apply to covenants which ran with the land, among which are covenants to warrant and defend the title. (p. 183.)

HEIRS—Liability for on Covenants of Ancestor, When Accrued.—To authorize a recovery against an heir or devisee, it must appear that the ancestor's estate was settled and closed before the claim accrued to the covenantee. (p. 183.)

HEIRS—Claims Against, Whether Barred by the Statute of Limitations.—Though a covenant against encumbrances is broken as soon as made, and there may be a recovery of nominal damages thereunder, yet there can be no recovery of substantial damages until the encumbrance is enforced, and therefore, the cause of action, as to such damages, cannot be regarded as accruing or becoming subject to the statute of limitations until that time. (p. 184.)

PARTIES TO ACTION to Enforce Ancestor's Liability.—If the grantor in a conveyance with covenants of warranty or against encumbrances subsequently dies, bequeathing his property to his wife for life, with power to use both principal and interest to supply herself with the comforts and luxuries she may desire, with remainder to a trustee for several beneficiaries, an action for damages resulting from the breach of the testator's covenant is properly brought against the wife and trustee, instead of against the remaindermen under the will. Perhaps they also should be made parties, but as this question is not covered by the demurrer, it is not decided. (p. 185.)

The petition showed that Warren Dee, being in April, 1879, the owner of a tract of land which was subject to a judgment in favor of John S. Woolson, conveyed such land, for a valuable

consideration, to the Western Wheel Scraper Company, which, on March 3, 1897, conveyed the same to plaintiff. Dee's conveyance contained general covenants of warranty. In October, 1897, plaintiff was compelled to, and did, expend eight hundred and fifty dollars in paying this judgment. Dee died testate, and his estate had been closed and settled prior to such payment. The defendant Eliza M. Dee was the widow of the decedent. The will gave and bequeathed to her, for and during her natural life, all his property of every character, and authorized her to use it, as well as the principal and rents and profits, for her support, and to supply herself with such luxuries and comforts as she might desire. Subject to such bequest, he bequeathed all the property which should not be consumed and used by his wife to John C. Power, as trustee, directing him to convert the property into money and to distribute it among a large number of collateral relatives named in the will. Judgment was asked against the widow and Power as trustee. A demurrer was interposed on the grounds: "1. Said cause is barred by the statute of limitations; 2. The facts stated do not entitle the plaintiff to the relief prayed for, in this: (a) Defendants were not parties to the deed upon which this action is based; (b) Neither of the defendants has wrongfully converted any property belonging to said Warren Dee to their own use; (c) It appears from the petition and amendment that the property which came into the hands of the defendants under the will of Warren Dee did not vest in them in fee, but for specific purposes, the title to the same not being in the defendants, or either of them." The demurrer being overruled, and defendants choosing not to amend, judgment was rendered against them, and they thereupon appealed.

Power & Power, for the appellants.

Babb & Babb, for the appellee.

549 WATERMAN, J. In disposing of the case, we shall follow counsel in the order of consideration of the questions presented.

According to the earlier common law, an heir was liable for the specialty debts of his ancestor to the extent in value of the assets (real estate) which descended to him: Rawle on Covenants, 309, 310; Bacon's Abridgment, tit. "Heir," 579. In two material respects this rule has been extended—first, by an English statute (3 & 4 W. & M.), which is a part of the common

law of this country (*O'Ferrall v. Simplot*, 4 Iowa, 381), and by which such liability was imposed also upon devisees: *Muldoon v. Moore*, 55 N. J. L. 410, 26 Atl. 892; *Rawle on Covenants*, sec. 311. But irrespective of this statute the provisions of our law making real property liable for the debts of the owner are in line of development of the common-law principle to which we have adverted, and operate to impress such property with a trust to secure payment of the ancestor's debts, when it is found in the hands either of an heir or devisee: *Rohrbaugh v. Hamblin*, 57 Kan. 393, 57 Am. St. Rep. 334, 46 Pac. 705. And next, an alteration grew out of the statutes of those states (our own among them) which provide for the descent of personalty in the same manner and to the same persons ⁵⁵⁰ as real estate. The effect of these statutes is to impose a liability upon the heir for the value of the personalty received, as well as the real estate: *Hall v. Martin*, 46 N. H. 337. According to the common law, the heir or devisee was not liable for breach of covenant, unless expressly bound. But this rule does not apply to covenants which run with the land: *Morse v. Aldrich*, 19 Pick. 449. The covenant in Dee's deed was general; that is, against encumbrances, and to warrant and defend the title. A covenant against encumbrances does not usually run with the land, for it is broken as soon as the conveyance is made: *Martindale on Conveyances*, 139; *Clark v. Swift*, 3 Met. (Mass.) 392. In England, such a covenant is coupled with one for quiet enjoyment, that being the form which corresponds with our warranty of title; and in such case it runs with the land, for it is then broken only by eviction: *Rawle on Covenants*, 89; *Anderson v. Knox*, 20 Ala. 156. Whether the covenant in this case extended in terms to quiet enjoyment does not appear. We think, however, that must be its effect. But the matter is not significant, for the general covenant to warrant and defend the title runs with the land in all cases: 4 *Kent's Commentaries*, 528. The heirs and devisees are bound for a breach of this covenant. Of course, to bind either heirs or devisees it must appear that the ancestor's estate was settled and closed before the claim accrued to the covenantee. The petition alleges such to have been the case in this instance. We are of the opinion plaintiff has a right of action for breach of covenant. The case of *Rohrbaugh v. Hamblin*, cited above, which is quite similar in its facts to the one before us, sustains this conclusion fully.

2. This brings us to the next question presented by the demurrer. Is the claim in suit barred by the statute of limita-

tions? The judgment was a lien on this land when Dee conveyed, and the covenant against encumbrances was, therefore, at once broken: *Harwood v. Lee*, 85 Iowa, 622, 52 N. W. 521. The grantee could have sued at once, ⁵⁵¹ but he would have recovered only nominal damages: *Harwood v. Lee*, 85 Iowa, 622, 52 N. W. 521. The warranty of title, which includes an assurance of possession, was not broken until the judgment, which was still a lien, was asserted against plaintiff and satisfied by him in the year 1897. This action was brought in August, 1898. In *Knadler v. Sharp*, 36 Iowa, 234, it is said: "The true rule in such cases, doubtless, is that the covenant against encumbrances is broken upon the making of the conveyance, so that the grantee might then maintain an action and recover nominal damages; but such action and recovery would not defeat or prevent another action by that grantee, or by the grantee of that grantee, however remote, when and after either had been required to discharge the encumbrance in order to protect his title. The breach as to the amount thus required to be paid would not occur until the payment, and then in favor of the party holding the title and making the payment." This doctrine has support in other decisions of this court in which it is held that the technical breach of covenant against encumbrances entitles one to but nominal damages, and a substantial recovery only can be had upon the satisfaction of the lien: *Norman v. Winch*, 65 Iowa, 263, 21 N. W. 598; *Nosler v. Hunt*, 18 Iowa, 212. It is also sustained by decisions of courts of other states: *Cheney v. Straube*, 35 Neb. 521, 53 N. W. 479; *Wyatt v. Dunn*, 93 Mo. 459, 2 S. W. 402, 6 S. W. 273; *Hunt v. Marsh*, 80 Mo. 396; *Guerin v. Smith*, 62 Mich. 369, 28 N. W. 906; *Post v. Campau*, 42 Mich. 98, 3 N. W. 277. In the last-mentioned case, Mr. Justice Cooley, speaking for the court, says: "The doctrine that the statute shall run from the technical breach makes the covenant in many cases a mockery. If the encumbrance consists of a mortgage having many years to run, the covenantee has no right to pay it off until it falls due and the fiction of a right to present action would defeat substantial redress." We do not think the decisions of this court which are cited by appellants as sustaining their position conflict with the ⁵⁵² rule above announced. The language quoted from *Funk v. Creswell*, 5 Iowa, 62, was employed in discussing the question whether a grantee could voluntarily satisfy an encumbrance existing upon the land when he took title, or whether he must wait until it was enforced against him. In *Yancey v. Tatlock*,

93 Iowa, 386, 61 N. W. 997, the action was brought within ten years from the date and delivery of the deed, so the issue here considered could not have been involved. In *Harwood v. Lee*, 85 Iowa, 622, 52 N. W. 521, the question before the court was only whether a grantee who had bought in, but who had not satisfied, the encumbrance, was entitled to damages. No duty rested on plaintiff to satisfy this encumbrance until it was asserted against him. Therefore, defendants cannot complain of the delay. The claim, in our opinion, was not barred.

3. It is next insisted this action should have been in equity, and against those entitled to the probable reversion. As *Eliza M. Dee* had the right of disposal of this property to supply her wants or gratify her wishes, it is manifest she was a necessary party defendant. To have brought the action against those only who were entitled to what was left on her death might well have been ineffectual, for there was no assurance when this action was brought or when it was tried in the district court that there would be any remainder. We do not think her own personal estate is liable for this judgment, leaving the whole remainder of *Warren Dee's* estate free from liability. By proper proceeding, *Warren Dee's* property can be made to bear the burden. We are not called upon to determine exactly what estate *Eliza M. Dee* took under the will of her husband. If she took an estate in fee, there is certainly no merit in the point we are now considering.

4. It is said that *Power* was not, in any event, a proper party defendant. He is a party in his trust capacity ⁵⁵³ only. The demurrer was joint, raising no issue on behalf of *Power* which was not raised on the wife's behalf. But, aside from this fact, it does not present the question discussed in this connection, viz., whether *Power*, as trustee, took any interest in the personality prior to the death of *Eliza M. Dee*. Perhaps the residuary legatees should also have been made parties, and the action should have been in equity, but the first of these matters is not covered by the demurrer, nor is any assignment of errors sufficient to raise it, and the other matter could be presented only by motion to transfer to the proper docket: Code, sec. 3432. The demurrer does not put in issue the fact that some interest or title vested in *Power* as trustee under the will, but asserts it was not a fee. If any interest passed, it was because the wife did not take an absolute estate; and, if this was the case, *Power*, as trustee, taking a legal interest, was a proper party: *Tucker v. Silver*, 9 Iowa, 261; *Darlington v. Effe*y, 13 Iowa, 177. Per-

haps the petition should have alleged against Power that the personal assets, which alone vested in him, were sufficient in value to satisfy plaintiff's claim. It did not do this. But again we must say the demurrer does not present the question, nor is it discussed by counsel.

We discover no error, and the judgment is affirmed.

Covenants for Quiet Enjoyment and covenants running with the land are considered generally in the monographic notes to *Chestnut v. Tyson*, 53 Am. St. Rep. 113-120; *Geiszler v. De Graaf*, 82 Am. St. Rep. 664-690. Heirs may be liable on the covenants of warranty of their ancestor after the settlement of his estate: *Rohrbaugh v. Hamlin*, 57 Kan. 393, 57 Am. St. Rep. 334, 46 Pac. 705. A breach of a covenant against encumbrances takes place, if at all, the instant the conveyance is made: *Huyek v. Andrews*, 113 N. Y. 81, 10 Am. St. Rep. 432, 20 N. E. 581. As to limitation of actions on covenants, see *Jones v. Bigstaff*, 95 Ky. 395, 44 Am. St. Rep. 245, 25 S. W. 889; *Pevey v. Jones*, 71 Miss. 647, 42 Am. St. Rep. 486, 16 South. 252; *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335.

CASES
IN THE
SUPREME COURT
OF
KANSAS.

THOMPSON v. HARRIS.

[64 Kan. 124, 67 Pac. 456.]

PRACTICE—Slander—Motion to Make Complaint More Definite and Certain.—If a complaint containing two or more counts alleges a speaking by the defendant of the different slanderous words stated in the several counts, the plaintiff, on motion of the defendant, should be required to make his complaint more definite and certain by showing therein whether the charges made in such counts all relate to words spoken in the same conversation. (p. 188.)

SLANDER—Different Words—When Give Rise to but One Cause of Action.—If several slanderous charges are all made in a single conversation, though relating to distinct offenses, they constitute but one cause of action. (p. 188.)

John Marshall, for the plaintiff in error.

Dan Carr, for the defendant in error.

124 CUNNINGHAM, J. This was an action by the defendant in error, as plaintiff below, against the plaintiff in error, as defendant below, to recover damages occasioned by the speaking by him of certain false and slanderous language concerning the plaintiff. The petition contained four causes of action. In the first ¹²⁵ it was alleged that the defendant spoke the words concerning the plaintiff which were claimed to be slanderous at a given time and place and in the presence of a certain named person. The third cause of action set out that the defendant spoke of the plaintiff certain other slanderous words at the same time, the same place, and in the presence of the same person as was described in the first cause of action. The second cause of action set out that the defendant had spoken

certain other words claimed to be slanderous concerning the plaintiff at a time and place and in the presence of a person as therein named. The fourth cause of action set out that the defendant had spoken certain other words claimed to be slanderous concerning the plaintiff at the same time and place and in the presence of the same person as was alleged in the second cause of action. A motion was made by the defendant to require the plaintiff to make his petition more definite and certain, by stating whether the slanderous words mentioned in the first and third causes of action were in the same conversation, and also, whether the slanderous words set out in the second and fourth causes of action were spoken in the same conversation. This motion was overruled by the court and the case went to trial as though four distinct causes of action were stated.

We think the court erred in this. If the conversations upon which the first and third causes of action were based were both parts of one and the same conversation, they afforded but one cause of action. It would appear from the fact that these were alleged to have taken place at the same time, in the same place and in the presence of the same person, and that they stated parts of but one and the same conversation; yet as this did not certainly appear, defendant ¹²⁶ was entitled to be definitely informed what plaintiff's claim was in this regard.

It is well settled that "when there are different sets of words, spoken at a particular time, although they charge distinct offenses, there will be but one cause of action": Maxwell on Code Pleading, 352. And that "a count of a petition in an action for slander, which sets out the entire conversation in which the slander was spoken, contains only one cause of action, although the conversation consists of several parts, each of which is actionable": Estee on Pleading, 3d ed., sec. 1717.

So that if the words spoken as alleged in the first and third causes of action were in fact spoken in the same conversation, as from the allegations in these causes of action they reasonably appear to have been, there was but one cause of action in reality, and the defendant was entitled to know exactly the fact relative to this matter, for he could not be called upon to answer two causes of action where but one existed. The same is true of the second and fourth causes of action.

This case affords ample illustration of the correctness of this rule, for upon the introduction of evidence it clearly appeared that the actionable words counted upon in the first and third causes of action really did constitute but one conversation, hence

one cause of action; so, also, with regard to the second and fourth causes of action. Further to illustrate the correctness of the rule, it may be noted that the court in its instructions to the jury in this case permitted it to find the defendant guilty upon any one of the four causes of action submitted to it, and hence put the defendant upon trial for and punished him in four causes of action, ¹²⁷ when in fact he should have been put upon trial for and punished in but two.

There are several other errors alleged by plaintiff in error, and we think some of them at least are well taken, but it is probable that in a retrial of the case they will not be repeated; hence we do not deem it necessary to comment upon them.

The judgment of the court below will be reversed and the case remanded for further proceedings in accordance with this opinion.

Ellis and Pollock, JJ., concurring.

Different Slandorous Words, spoken at different times, constitute distinct causes of action, and should be embodied in separate counts; but different sets of words, importing the same charge, laid as spoken at the same time, may be included in the same count: *Patterson v. Wilkinson*, 55 Me. 42, 92 Am. Dec. 568.

ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY v. OSBORN.

[64 Kan. 187, 67 Pac. 547.]

EVIDENCE Taken at a Former Trial may be Proved on a Second Trial of the Same Action if the witness has removed from the state or is otherwise beyond the jurisdiction of the court. (p. 190.)

EVIDENCE.—A Stenographer Who Took the Testimony at a Former Trial of the Cause, and who is able to read his notes and willing to testify that they are correct, should be permitted to testify therefrom as to what was the testimony of a witness at such former trial. (p. 190.)

A. A. Hurd and O. J. Wood, for the plaintiff in error.

Sankey & Campbell, for the defendant in error.

¹²⁷ **JOHNSON, J.** This action was brought by M. H. Osborn against the Atchison, Topeka and Santa Fe Railroad Company to recover damages for the destruction of wheat by fire alleged to have been negligently started by the railroad com-

pany. The first trial resulted in a judgment in favor of Osborn, which upon review was set aside, and the case was remanded for another trial: *Atchison etc. R. R. Co. v. Osborn*, 58 Kan. 768, 51 Pac. 286. At the second trial, the testimony of three persons who had testified on the first was offered by the railroad company and was rejected; and this ruling is the principal error assigned for reversal by the company, which was again the losing party.

It was shown that the witnesses were beyond the jurisdiction of the court and the reach of its process, and that one of them resided in another state. It was agreed that the persons referred to were called as witnesses ¹⁸⁸ on the former trial, that they were examined by defendant and cross-examined by plaintiff, and that their testimony was taken down by the official stenographer, who appeared with the same ready to testify, and that he was then able to read the notes and would testify that they were correct. The offered testimony was unquestionably material and pertinent to the issues in the case, and we think it should have been received. Under the general doctrine governing the admission of such testimony, it was early decided that the testimony of a deceased witness upon a former trial between the same parties was admissible, and that it was not necessary to give the exact words of the witness, but it was sufficient to prove the substance of such testimony: *Gannon v. Stevens*, 13 Kan. 447; *Solomon R. R. Co. v. Jones*, 34 Kan. 443, 8 Pac. 730. The rule was upheld in a criminal case, wherein the personal presence of the witness is of great importance: *State v. Wilson*, 24 Kan. 189, 36 Am. Rep. 257. It was there held that the admissibility of the testimony depended upon two essentials—one, that it was given in a judicial proceeding between the same parties, upon the same subject of inquiry; and the other, that there was opportunity and power to cross-examine. As an authority, the court cited 1 Greenleaf on Evidence, section 163, where the learned author holds that the rule as to deceased witnesses is equally applicable to witnesses who are outside the jurisdiction of the court and out of the reach of its process. The rule laid down by Greenleaf was recognized in the case of *Gilmore v. Butts*, 61 Kan. 315, 59 Pac. 645, where the court had under consideration the admission of a copy of a lost deposition. It was there said that "the trend of modern authorities is to the effect that if the witness, though not dead, is out of the jurisdiction, or ¹⁸⁹ cannot be found after diligent search, or is insane, sick, or unable to testify, or

has been subpoenaed but appears to have been kept away by the adverse party, his testimony given at a former trial may be received."

The supreme court of Michigan holds that a witness who is beyond the jurisdiction of the court is, to all intents and purposes, so far as the parties to the litigation are concerned, legally dead. The process of the court can no more reach him, and the parties can no more avail themselves of his personal presence than if he were, in fact, dead: *Howard v. Patrick*, 38 Mich. 795. While there is some diversity of judicial opinion as to the admissibility of testimony given by a witness on a former trial, the great weight of authority, we think, sustains the Greenleaf rule: *Minneapolis Mill Co. v. Minneapolis etc. Ry. Co.*, 51 Minn. 304, 53 N. W. 639; *People v. Devine*, 46 Cal. 46; *City of Omaha v. Jensen*, 35 Neb. 68, 37 Am. St. Rep. 432, 52 N. W. 833; *Young v. Sage*, 42 Neb. 37, 60 N. W. 313; *Perrin v. Wells*, 155 Pa. St. 299, 26 Atl. 543; *Magill v. Kauffman*, 4 Serg. & R. 317, 8 Am. Dec. 713; *Reynolds v. Powers*, 96 Ky. 481, 29 S. W. 299; *Shackleford v. State*, 33 Ark. 539; *Sneed v. State*, 47 Ark. 180, 1 S. W. 68; *Mattox v. United States*, 156 U. S. 237, 15 Sup. Ct. Rep. 337; *Brown v. Luehrs*, 79 Ill. 575; *Sullivan v. State*, 6 Tex. App. 319, 32 Am. Rep. 580; *Dean v. State*, 89 Ala. 47, 8 South. 38; *Reese v. Morgan Silver Min. Co.*, 17 Utah, 489, 54 Pac. 759; *Emerson v. Burnett*, 11 Colo. App. 86, 52 Pac. 752.

The provision made by statute for the taking of depositions does not militate against this rule. Testimony taken down word for word at a former trial and preserved as the law provides, is evidence of at least as high grade as a deposition. The testimony is taken in open court, in the presence of parties and ¹⁹⁰ witnesses, under the eye and supervision of the trial judge, where there is full opportunity to examine and cross-examine the witness, to search his motives, appeal to his conscience, and test his recollection and the accuracy of his statements. So taken, it must be as high order of testimony as a deposition taken upon interrogatories in the private office of a notary public, or other like officer, in some town or city remote from the one in which the trial is had. Under our system, where the words of a witness are taken as they fall from his lips and are recorded by an official stenographer who performs his duties under the sanction of an oath, the written testimony, being preserved as the statute directs, is likely to be more satisfactory and reliable than that taken in the form of a deposition.

the original plaintiff testified to on the first: *Chicago etc. R. R. Co. v. O'Connor*, 119 Ill. 586, 9 N. E. 264. And evidence of what a plaintiff testified to in action before a justice of the peace is admissible on the trial of the case in a higher court on appeal, if the plaintiff is dead at the time of the second trial, and the suit was revived in the name of his administrator: *Lewis v. Ronlo*, 93 Mich. 475, 53 N. W. 622; *Geoch v. Carlson*, 96 Wis. 138, 71 N. W. 116. In *Hoover v. Jennings*, 11 Ohio St. 624, it was held, however, under the provision of a statute, that in a suit by or against an administrator, it is not competent for him to prove what was testified to by his intestate on a former trial of the same action. In a suit against the representative of a deceased person, evidence introduced to show what such person testified to in a suit against him in his lifetime, for substantially the same cause of action, and which was terminated by the death of the defendant, is admissible, although his widow has become competent to testify by his death: *Mathewson v. Estate of Sargeant*, 36 Vt. 142.

b. *Incapacity of Witness.*—The testimony of a witness on a former trial who has since become mentally incapacitated to testify is competent in a subsequent trial of the same action. Such witness is deemed mentally dead: *Stout v. Cook*, 47 Ill. 530; *Howard v. Patrick*, 38 Mich. 795; *Whitaker v. March*, 62 N. H. 477; *Bemey v. Michell*, 34 N. J. L. 337; *Drayton v. Wells*, 1 Nott & McC. 409, 9 Am. Dec. 718. And it makes no difference that the witness who, since testifying, has become insane, is a party to the suit: *Wafer v. Hemken*, 9 Rob. (La.) 203. If it is shown that the witness is too ill to attend court, his testimony taken at a former trial between the same parties for the same cause may be admitted: *Miller v. Russell*, 7 Martin, N. S., 266; *Wafer v. Hemken*, 9 Rob. 203; *Howard v. Patrick*, 38 Mich. 795; *Morehouse v. Morehouse*, 41 Hun, 146; *Perrin v. Wells*, 155 Pa. St. 299, 26 Atl. 543. But if the sickness of the witness is not so severe as to disable him from doing some work, and from being up and about the house, his evidence taken on the former trial is not admissible: *Siefert v. Siefert*, 123 Mich. 664, 82 N. W. 511. Or if counsel enter upon the trial of a case knowing that an important witness is ill and may not be able to attend, it seems that he is not entitled, in the midst of the trial, to present the fact of the illness of such witness, and then testify to what the latter said upon the former trial of the case. In such case, counsel should ask for a continuance of the trial: *Chicago etc. R. R. Co. v. Mayer*, 91 Ill. App. 372. If from extreme old age, and both physical and mental infirmity, a witness has become incompetent to testify to facts once within his knowledge and memory, and it appears likely that he will remain in such condition, or grow worse, there is no abuse of discretion in admitting in evidence his testimony introduced on a former trial of the same case when he was not so afflicted with such infirmities: *Central R. R. etc. Co. v. Murray*, 97

Ga. 326, 22 S. E. 972; *Bothrock v. Gallaher*, 91 Pa. St. 108; *Thornton v. Britton*, 144 Pa. St. 126, 22 Atl. 1048. The deposition or testimony of a witness formerly taken in the same case may be read on a second trial thereof on showing that he was sick and unable to attend, insane, or in such a state of senility from old age as to have lost his memory, just the same as if he were dead or out of the jurisdiction: *Emig v. Diehl*, 76 Pa. St. 359. Testimony of a witness in a former trial is admissible if it appears that by reason of physical incapacity he is unable to attend the trial, and that his deposition could not have been taken by the exercise of due diligence: *Kirchner v. Laughlin*, 5 N. Mex. 365, 23 Pac. 175. The deposition of a witness taken while he is competent should not be rejected on the second trial of the suit in which he has become interested as a party, by the death of the person who took the deposition: *Smithpeters v. Griffin*, 10 B. Mon. 259. The failure of the witness to recollect particular facts, if short of mental incapacity, will not admit proof of his testimony at a former trial: *Stein v. Swensen*, 46 Minn. 360, 24 Am. St. Rep. 234, 49 N. W. 55. And the mere fact that the witness has forgotten the facts to which he formerly testified is never sufficient to render evidence of his former testimony admissible: *Robinson v. Gilman*, 43 N. H. 295. The conviction of the witness of an infamous crime renders his evidence given on the first trial of a civil suit inadmissible on the second trial: *Le Baron v. Crombie*, 14 Mass. 234.

c. **Absence of Witness.**—The fact that a witness is beyond the jurisdiction of the state, or of the court, is generally a sufficient excuse for not producing him. Hence, if it is shown that a witness is absent from the state, or a nonresident, or out of the jurisdiction of the court, or if his place of residence is unknown, testimony given by him upon a former trial, and correctly preserved, is admissible in evidence on a subsequent trial of the same cause. It makes no difference whether his testimony was given in the form of a deposition, or orally, if it has been preserved in the manner pointed out by law: *Long v. Davis*, 18 Ala. 801; *Mims v. Sturdevant*, 36 Ala. 636; *Birmingham Nat. Bank v. Bradley* (Ala.), 30 South. 546; *Clinton v. Estes*, 20 Ark. 216; *McTighe v. Herman*, 42 Ark. 285; *Benson v. Shotwell*, 103 Cal. 163, 37 Pac. 147; *Rico Reduction etc. Co. v. Musgrave*, 14 Colo. 79, 23 Pac. 458; *Eagle Mfg. Co. v. Welch*, 61 Ga. 444; *Atlanta etc. Ry. Co. v. Gravitt*, 93 Ga. 369, 44 Am. St. Rep. 145, 20 S. E. 550; *Reynolds v. Powers*, 96 Ky. 481, 29 S. W. 299; *Reynolds v. Rowley*, 2 La. Ann. 890; *Succession of Saunders*, 37 La. Ann. 769; *Howard v. Patrick*, 38 Mich. 795; *Stewart v. First Nat. Bank*, 43 Mich. 257, 5 N. W. 302; *Wheeler v. Jenison*, 120 Mich. 422, 79 N. W. 643; *Minneapolis Mill Co. v. Minneapolis etc. Ry. Co.*, 51 Minn. 304, 53 N. W. 639; *Hill v. Winston*, 73 Minn. 80, 75 N. W. 1030; *Omaha St. Ry. Co. v. Elkins*, 39 Neb. 480, 58 N. W. 164; *Young v. Sage*, 42 Neb. 37, 60 N. W. 313; *Ord v. Nash*, 50 Neb. 335, 69 N. W. 964; *Kirchner v. Laughlin*, 5 N. Mex. 365, 23 Pac. 175; *Magill v. Kauffman*, 4 Serg. & R. 317, 8 Am. Dec. 713; *Noble v. McClintock*, 6 Watts

& S. 58; *Wright v. Cumpsty*, 41 Pa. St. 102; *Wheeler v. McFerron*, 38 Or. 105, 62 Pac. 1015; *Drayton v. Wells*, 1 Nott & McC. 409, 9 Am. Dec. 718; *Yancey v. Stone*, 9 Rich. Eq. 429. The contrary rule is announced in *Berney v. Mitchell*, 34 N. J. L. 337, wherein it is held that, although it is shown, on an appeal from a justice's judgment, that a material witness who testified before the justice has left the state and could not, after due diligence, be found, nor his residence be ascertained, yet his former evidence was not admissible on such appeal. A similar ruling is found in *Mutual Life Ins. Co. v. Anthony*, 50 Hun, 101, 4 N. Y. Supp. 501, and in *Wilbur v. Selden*, 6 Cow. 162.

Testimony of a witness given at a former trial is admissible when his presence at the second trial of the same case cannot be procured: *Closetman v. Barbancey*, 7 Rob. (La.) 438; *Powell v. Manson*, 22 Gratt. 177. If it is impossible to secure the presence of a witness who has testified at the first trial of the case, it is proper to admit evidence of an unsuccessful effort to find him, in order to lay the foundation for admitting his testimony given on the former trial: *Ballman v. Heron*, 169 Pa. St. 510, 32 Atl. 594. Evidence of a witness who has since absconded, and cannot, by diligent search be found, and whose address is unknown, is admissible at a subsequent trial of the same cause: *Gunn v. Wades*, 65 Ga. 537; *Augusta Wine Co. v. Weippert*, 14 Mo. App. 483. Testimony of a witness given on a former trial may be given on a trial when he is kept away from the second trial by the opposite party: *Kirchner v. Laughlin*, 5 N. Mex. 365, 23 Pac. 175; *Dayton v. Wells*, 1 Nott & McC. 409, 9 Am. Dec. 718; *Yancey v. Stone*, 9 Rich. Eq. 429. If a deputy sheriff, required as a witness, is absent on official duty, his testimony given on a former trial may be read in evidence: *Noble v. Martin*, 7 Martin, N. S., 282. Evidence of an absent witness given at a former trial is not admissible if his deposition has been taken and is produced at the second trial: *Stein v. Swensen*, 46 Minn. 360, 24 Am. St. Rep. 234, 49 N. W. 55. And some cases hold that if the whereabouts of an absent witness is known, and his deposition could have been taken, testimony given by him on a former trial of the case is inadmissible: *Gastrell v. Phillips*, 64 Miss. 473, 1 South. 729; *Gerhauser v. North British etc. Ins. Co.*, 7 Nev. 174. A witness outside the county, but within the state, is not out of the jurisdiction of the court, so as to authorize the reading of his testimony given on a former trial: *Meyer v. Roth*, 51 Cal. 582; *Butcher v. Vaca Valley R. R. Co.*, 56 Cal. 598. The contrary doctrine is, however, maintained in *Bank of Monroe v. Gifford*, 79 Iowa, 300, 44 N. W. 558. Parol evidence of the testimony of an absent witness on a former trial of the same case is not admissible where the parties have relied upon his mere promise to attend, and have made no effort to compel his attendance, although he was within the jurisdiction of the court: *Provo City v. Shurtliff*, 4 Utah, 15, 5 Pac. 302.

In accordance with the holding last cited, it may be stated as a general proposition that the evidence given by a witness at a former

trial of the case is not admissible on the second trial, when such witness, though absent, might have been produced on the trial: *Savannah etc. Ry. Co. v. Flannagan*, 82 Ga. 579, 14 Am. St. Rep. 183, 9 S. E. 471; *McEhmurray v. Turner*, 86 Ga. 215, 12 S. E. 359; *Powell v. Waters*, 17 Johns. 176; *Mott v. Ramsey*, 92 N. C. 152.

The testimony of a party or witness given at a former trial cannot be read in evidence when he is alive and in the presence of the court: *Curren v. Ampersee*, 96 Mich. 553, 56 N. W. 87; *Byrd v. Hartman*, 70 Mo. App. 57. If a party and his witnesses are present in court, their testimony on a former trial, as set forth in a bill of exceptions, is not admissible: *Sargeant v. Marshall*, 38 Ill. App. 642; *Trimmel v. Marvel*, 11 La. Ann. 404; *Leeser v. Boekhoff*, 38 Mo. App. 445. The testimony of a witness given at a former trial, when such witness is actually or presumptively within the jurisdiction or presence of the court upon the second trial, is hearsay and inadmissible: *Michigan Sav. Bank v. Butler*, 98 Mich. 381, 57 N. W. 253; *Hunter v. Lanius*, 82 Tex. 677, 18 S. W. 201; *Salt Lake City v. Smith*, 104 Fed. 458. The testimony of a witness on a former trial of the case is not generally admissible, if he is temporarily absent from the place of trial but within the jurisdiction of the court: *Wabash R. R. Co. v. Miller*, 27 Ind. App. 180, 61 N. E. 1005.

d. Interest of Witness.—Testimony taken under oath, and reduced to writing on the first trial of a case, is admissible in evidence on the second trial thereof where the witness has since become interested in, and a party to, the suit: *Wafer v. Hemken*, 9 Rob. 203. The testimony of a person becoming interested as the husband of a deceased contestant of a will may be given in evidence on a new trial of the case: *In re Budlong*, 54 Hun, 131, 7 N. Y. Supp. 289. If one of the parties dies during the pendency of the action, thereby rendering the other party incompetent to testify, his testimony given at the first may be proved at the second trial by the evidence of other witnesses: *Lee v. Hill*, 87 Va. 497, 24 Am. St. Rep. 666, 12 S. E. 1052. Notes of plaintiff's testimony taken on a former trial of the same cause may be read at the subsequent trial, though the plaintiff is rendered an incompetent witness by the death of the defendant before the trial of the second action: *Pratt v. Patterson*, 81 Pa. St. 114. It has been held that the testimony of a witness given on a former trial cannot be admitted on the ground of his subsequent disqualification as a witness by acquiring an interest in the subject matter of the suit before the second trial: *Chess v. Chess*, 17 Serg. & R. 409. It seems that the testimony of a party given on the trial of an action on contract between such party and an agent is not admissible on a subsequent trial of the action, where the agent has died since the first trial: *Turnkey v. Hedstrom*, 131 Ill. 204, 23 N. E. 587.

Evidence of the testimony of a witness since deceased given upon a former trial is inadmissible, where, if living, he would not be a

competent witness on the second trial because of his interest in the case: *Eaton v. Alger*, 47 N. Y. 345. The testimony of an interested witness, since deceased, cannot be proved, in a second trial, by the party in whose favor he was interested, against the objection of the other party, though he was the latter's witness on the first trial: *Crary v. Sprague*, 12 Wend. 41, 27 Am. Dec. 110.

c. In Other Actions or Proceedings.

1. **General Admissibility of.**—The rule to which we have referred is by no means limited to the testimony given at a former trial of the action or other proceeding in which the testimony of the deceased or absent witness is offered. Subject to the limitations hereinafter stated requiring identity of parties, of issues, and perhaps of subject matter, testimony given on the trial of an action or proceeding is receivable at a trial of another and different action or proceeding to the same extent and under the same circumstances as it would be receivable if taken at a previous trial of the action or proceeding in which it is offered: *Goodlett v. Kelly*, 74 Ala. 213; *School Board of Trimble*, 33 La. Ann. 1073; *Price v. Lawson*, 74 Md. 499, 22 Atl. 206; *Howard v. Patrick*, 38 Mich. 795; *Mathewson v. Sargent*, 36 Vt. 142; *Yancey v. Stone*, 9 Rich. Eq. 429.

2. **Identity of Issues and Subject Matter.**—In order that the testimony given on a former trial by a witness since deceased, incapacitated or out of the jurisdiction of the court, may be given in evidence on a second trial of the case, not only the parties, but also the subject matter and the issues involved in the two actions, must be the same or at least substantially the same: *McTighe v. Herman*, 42 Ark. 285; *Hutchings v. Corgan*, 59 Ill. 70; *Rucker v. Hamilton*, 3 Dana, 36; *Haslam v. Campbell*, 60 Ga. 650; *Lathrop v. Adkisson*, 87 Ga. 339-343, 13 S. E. 517; *Melvin v. Whiting*, 7 Pick. 79; *Jaccard v. Anderson*, 37 Mo. 91; *Osborn v. Bell*, 5 Denio, 370, 49 Am. Dec. 275; *Bryan v. Malloy*, 90 N. C. 508; *Cluggage v. Duncan*, 1 Serg. & B. 110; *Bishop v. Tucker*, 4 Rich. 178. Some of the earlier cases maintained that the evidence of such witness was admissible in a subsequent suit between the same parties or their privies, touching the same subject matter, although the issues involved in the two suits might not be identical: *Long v. Davis*, 18 Ala. 801; *Atlanta etc. R. R. v. Venable*, 67 Ga. 697; *Jones v. Wood*, 16 Pa. St. 25; *Parker v. Legett*, 12 Rich. 198. The rule seems to be universally adopted by the later authorities, that evidence as to what a deceased or absent witness testified to on a previous trial is not admissible when it appears that the issue therein involved was not identical or substantially the same as that in controversy at the trial at which such evidence is offered: *Whitaker v. Arnold*, 110 Ga. 857, 36 S. E. 231; *Hooper v. Southern Ry. Co.*, 112 Ga. 96, 37 S. E. 165; *Succession of Rieger*, 37 La. Ann. 104; *Goodwin v. Neustadt*, 47 La. Ann. 841, 17 South. 471; *Schindler v. Milwaukee etc. R. R. Co.*, 87 Mich. 400, 49 N. W. 670; *Murphy v. New York etc. R.*

R. Co., 31 Hun, 358; Bishop v. Tucker, 4 Rich. 178. This question often arises in cases where an infant sues to recover for an injury and then dies, and an action is afterward brought by his parent to recover for the same injury, and in such case the testimony of the infant taken on the first trial is not admissible on the second, as the issues are not the same: Hooper v. Southern Ry. Co., 112 Ga. 96, 37 S. E. 165; Metropolitan St. Ry. Co. v. Gumby, 99 Fed. 192. On the trial of an action by an administrator to recover for the death of his intestate caused by a wrongful act, evidence is admissible to prove the testimony of witnesses since deceased, on the trial of an action by such intestate, abated by his death, to recover damages for the same wrongful act. The issues are the same in both actions: Indianapolis etc. R. R. Co. v. Stout, 53 Ind. 144. In trover against the obligors in a bond of indemnity given a sheriff on a levy of execution, testimony of witnesses in a former replevin suit against the officer to recover the property is admissible: Woodworth v. Gorsline (Colo.), 69 Pac. 705. The testimony given in an action of ejectment is not admissible in a subsequent action of ejectment, unless both actions are between the same parties or their privies, and in relation to the same title: Davenport v. Henderson, 84 Ga. 313, 10 S. E. 920; Cluggage v. Duncan, 1 Serg. & R. 111; Sample v. Coulson, 9 Watts & S. 62. It has been held that the bare fact of two persons holding different parcels of what was once an undivided tract of land, deriving title from the same source, constitutes no privity of estate, so that the testimony of a witness since deceased on a trial of ejectment against one for the premises in his possession can be given in evidence in an action of ejectment against the other for the premises possessed by him, although both actions are by the same claimant: Jackson v. Crissey, 3 Wend. 251.

3. Identity of Parties.—In order to entitle the testimony of a witness since deceased, or out of the jurisdiction of the court, given on a former trial, to be received in evidence, it must be shown that the testimony was given in a case in which the parties to the suit in which it is offered, or their privies were parties: Bryant v. Owen, 2 Stew. & P. 134; McTighe v. Herman, 42 Ark. 285; Lane v. Brainerd, 30 Conn. 565; Hughes v. Clark, 67 Ga. 19; Goodrich v. Hanson, 33 Ill. 498; Earl v. Hurd, 5 Blackf. 248; Ephraims v. Murdock, 7 Blackf. 10; M'Cully v. Barr, 17 Serg. & R. 445; McMorine v. Storey, 4 Dev. & B. 189, 34 Am. Dec. 374; Killingsworth v. Bradford, 2 Over. 204. Evidence of absent heirs given on a former trial involving the validity of a will is admissible in a subsequent action involving the same subject matter and privity of parties: Payne v. Price, 16 B. Mon. 86. If a parent begins suit against a railroad company to recover for a personal injury to herself, and subsequently dies from the result of such injury, and suit is then brought by her child to recover for the same injury, evidence given by the mother in the suit by herself is admissible in the action by her child: Atlanta etc. R. R. v. Venable, 67 Ga. 697. An action of unlawful detainer brought

by the executor of a deceased person to recover the possession of certain premises for his alleged lessee, and a subsequent action by the latter against the heirs at law of the deceased to quiet a title claimed to have been acquired by adverse possession to the same premises, are actions between the same parties, within the rule under consideration: *Fredericks v. Judah*, 73 Cal. 604, 15 Pac. 305. A deposition of a party taken so as to be admissible in a pending case is admissible in a subsequent suit between the administrators of the parties involving the same subject matter: *Evans v. Reed*, 78 Pa. St. 415. The conditions on which the evidence of a witness on a former trial, since deceased, may be reproduced on the trial of a subsequent suit are that the matters in issue and the parties are essentially the same in both actions. "Parties," as thus used, comprehend privies in blood, in law, or in estate: *Patton v. Pitts*, 80 Ala. 373. Hence, the testimony of a witness in a prior action is not admissible after his decease, in a subsequent action between different parties, and involving a controversy as to a different matter: *Marshall v. Hancock*, 80 Cal. 82, 22 Pac. 61; *Stockmeyer v. Weidner*, 32 La. Ann. 106; *Burnham v. Burnham*, 46 App. Div. 513, 62 N. Y. Supp. 120; affirmed, 165 N. Y. 659, 59 N. E. 1119; *Harper v. Burrow*, 6 Ired. 30; *Fellers v. Davis*, 22 S. C. 425. Nor is such evidence admissible if the parties in the two suits are different, although the subject matter is the same: *Burroughs v. Hunt*, 13 Ind. 178. Or the deposition of a witness taken in a former action is not admissible in a subsequent one, unless the parties and matters in issue in the latter are the same as in the former: *Bryan v. Malloy*, 90 N. C. 508. Testimony given on a trial in ejectment cannot be introduced after the death of the witness, in an action between other parties in interest upon a covenant of warranty: *Mason v. Kellogg*, 38 Mich. 132. The testimony of a witness, since deceased, given at a former trial, is not admissible as evidence at a subsequent trial, although the same question be involved between the same parties, if another person not a privy is added as a new party at the subsequent trial: *Orr v. Hadley*, 36 N. H. 575; *Roberts v. Anderson*, 3 Johns. Ch. 371; *Varnum v. Hart*, 47 Hun, 18; *Mathews v. Colburn*, 1 Strob. 258. The testimony of a witness who is dead or out of the state, which was given in an action of ejectment by one cotenant, cannot be given in evidence in another action of ejectment for part of the same land by another cotenant: *Norris v. Mounen*, 3 Watts, 465. And a disclosure by a trustee is not admissible evidence for him in another action, in favor of one not a party to the trustee process: *Wise v. Hilton*, 4 Greenl. 435; *Edmond v. Caldwell*, 15 Ma. 340. Testimony of witnesses recorded in a case made cannot be introduced as evidence on the trial of an action between strangers to the record of the case made, involving the same issues and subject matter: *Iretom v. Iretom*, 59 Kan. 92, 52 Pac. 74.

1. **Opportunity to Cross-examine.**—If a witness is dead, his testimony in one proceeding may be used in another between the same parties, if the party against whom the evidence is offered actually

cross-examined him, or had an opportunity to cross-examine him in the former proceeding: *O'Brian v. Commonwealth*, 6 Bush, 564; *Breeden v. Fourth*, 70 Mo. 624; *Ritchie v. Lyne*, 1 Call, 539. If the defendant has had legal notice of the commencement of an action against him, and has not appeared either by himself or attorney at the trial, and judgment by default has been taken against him, the evidence of a witness since deceased, given on the first trial to sustain the pleadings, is admissible on a second trial of the same case, although there was no cross-examination, as the opportunity therefor was given: *Bradley v. Mirick*, 91 N. Y. 293; *O'Neill v. Brown*, 61 Tex. 34; *Deming v. Chase*, 48 Vt. 382. In all cases where testimony has been given in a former trial by a witness since deceased, and there has been no opportunity to cross-examine him by the parties to the second action, either because of the ex parte nature of the evidence, or because the second action is between different parties, or there has been a new party added thereto, the evidence thus given is not admissible in the second suit. This rule is illustrated by the cases cited *supra* under the heading of "Identity of Parties," and is expressly stated in *Golden v. Newbrand*, 52 Iowa, 59, 35 Am. Rep. 257, 2 N. W. 537; *Matter of Mason*, 9 Rob. (La.) 105; *Walsh v. McIntire*, 68 Md. 402, 13 Atl. 348; *Rippowam v. Strong*, 2 Hilt. 52. The testimony of a witness since deceased, given at a coroner's inquest, is not admissible in favor of defendant on the trial for an alleged negligent killing unless it appears that the plaintiff had an opportunity to cross-examine the witness either by himself or counsel: *Jackson v. Crilly*, 16 Colo. 103, 26 Pac. 331; *Petrie v. Columbia etc. R. R. Co.*, 29 S. C. 303, 7 S. E. 515. Evidence given by an expert witness since deceased, on a former trial between the same parties is not rendered inadmissible by the fact that new and unexpected matters have been introduced on the second trial, upon which the expert was not cross-examined on the first trial: *First Nat. Bank v. Wirebach*, 106 Pa. St. 37.

g. Nature of Proceeding.—The rule admitting the evidence of a witness since deceased or out of the jurisdiction of the court, given on a former trial of the case, if the action is again tried between the same parties or privies, and involves the same subject matter, refers to a proceeding in the first place, where the trial is closed and the case submitted to the jury: *Lawson v. Jones*, 61 How. Pr. 424; and it applies to any former trial, and not merely to the evidence taken at the last preceding trial, where there has been more than one: *Koehler v. Scheider*, 16 Daly, 235. The rule does not apply to a trial which is adjourned before the cross-examination of a witness since deceased is completed: *Morley v. Castor*, 63 App. Div. 38, 71 N. Y. Supp. 368. It has, however, been held that if plaintiff dismisses his action and brings another in renewal thereof, answers to interrogatories duly sued out, executed and returned while the first action is pending, and introduced on a trial thereof, are admissible on a trial of the second action: *Radford v. Georgia etc.*

Ry., 113 Ga. 627, 39 S. E. 108. The testimony of a witness at a former trial, who has since died, given before a court having jurisdiction of the parties and power to administer oaths, may be introduced in evidence at a subsequent trial of the same case, regardless of the fact whether the court had jurisdiction of the subject matter in the former action or not: *Jerome v. Bohm*, 21 Colo. 322, 40 Pac. 570. The testimony of a witness or party duly taken at a hearing before a master is, after the decease of such witness, admissible in any subsequent trial of the same matter in court: *Bruner v. Battell*, 83 Ill. 317; *Bonnet v. Dickson*, 14 Ohio St. 434. The testimony of a witness since deceased given before a magistrate in a criminal proceeding for an assault may be used against or for the defendant in a subsequent civil suit for damages by the person assaulted: *Gavan v. Ellsworth*, 45 Ga. 283; *Charlesworth v. Tinker*, 18 Wis. 633. Evidence taken orally before a former county judge in an action pending before him cannot be ordered to stand as evidence, upon a new trial of the case before his successor: *Putnam v. Crumbie*, 34 Barb. 232. The examination of a witness before a referee in the presence of the parties to the suit, and signed by the witness who has since died, may be read as evidence on the trial of the suit: *Nutt v. Thompson*, 69 N. C. 548. It is a general rule that what a witness swears to on a regular trial before arbitrators is legal evidence, and if the witness is dead or out of the state, his evidence given before arbitrators may be proved on any other trial between the same parties, in relation to the same matter: *Kelly v. Connell*, 8 Dana, 532; *Baily v. Woods*, 17 N. H. 365; *McAdams v. Stilwell*, 13 Pa. St. 90; *Insurance Co. v. Johnson*, 23 Pa. St. 72; *Wallbridge v. Knipper*, 96 Pa. St. 48. In *Jessup v. Cook*, 6 N. J. L. 434, it is held, on the contrary, that evidence taken before arbitrators is not admissible on a trial of the same cause, though the witness be dead.

III. Preliminary Evidence.

a. *Identity of Parties and Issues.*—The testimony of deceased witnesses in a previous action between the same parties and for the same subject matter is admissible as evidence in a subsequent suit to contest the same right, either for or against the same parties or privies in law, in blood or in estate. But such privity must first be shown to exist, and it must appear that such evidence was regularly and judicially taken: *Bryant v. Owen*, 2 Stew. & P. 134. It is necessary to the admission of such evidence that it be shown by the record of the former trial that that action was between the same parties and for the same cause of action: *Ephraims v. Murdock*, 7 Blackf. 10; *Neff v. Smith*, 91 Iowa, 67, 58 N. W. 1072; *Chambers v. Hunt*, 22 N. J. L. 552; *Beals v. Guensey*, 8 Johns. 446, 5 Am. Dec. 348; *Draper v. Stanley*, 1 Heisk. 432. It has, however, been held that, upon proof that a deceased witness testified on the former trial, his testimony may be read in evidence without a formal

offer of the record of the previous trial: *Luetgert v. Volker*, 153 Ill. 385, 39 N. E. 113. Such testimony is admissible, it seems, though unaccompanied with the record, if no objection is made at the trial on that ground: *Beals v. Guernsey*, 8 Johns. 446, 5 Am. Dec. 348; *White v. Kibling*, 11 Johns. 128.

b. *Showing Death, Illness, or Absence of Witness.*—A party is not permitted to prove what one of his witnesses, alleged to have since died, swore to on a former trial of the same cause, until he has proved that such witness is dead: *Hobson v. Doe*, 2 Blackf. 308; *Rooker v. Parsley*, 72 Ind. 497; *Woolen v. Whiteacre*, 91 Ind. 502; *Wabash R. R. Co. v. Miller*, 27 Ind. App. 180-183, 60 N. E. 1127; *Jackson v. Bailey*, 2 Johns. 17.

The testimony of a witness given on a former trial, and who is ill, cannot be read in evidence on a subsequent trial without a sufficient showing that such witness is unable to attend the trial of the case: *Edwards v. Edwards*, 93 Iowa, 127, 61 N. W. 413; *Franklin Coal Co. v. McMillan*, 49 Md. 549, 33 Am. Rep. 280. But a witness need not have been subpoenaed before his former evidence may be read, when he is a paralytic, and absolutely unable to attend the trial: *Covanhoven v. Hart*, 21 Pa. St. 495, 60 Am. Dec. 57. If a witness is absent from the state or out of the jurisdiction of the court, evidence to show what his testimony was upon a former trial of the case is not admissible without a showing of his absence and of due diligence to procure either his attendance or his deposition: *Cassady v. Trustees*, 105 Ill. 560; *Plano Mfg. Co. v. Parmenter*, 56 Ill. App. 258; *Hemingway etc. Co. v. Porter*, 94 Ill. App. 609; *Slusser v. City of Burlington*, 47 Iowa, 300; *Case v. Blood*, 71 Iowa, 632, 33 N. W. 144; *Arderry v. Commonwealth*, 3 J. J. Marsh. 183; *Darnall v. Goodwin*, 1 Har. & J. 282; *Wilder v. City of St. Paul*, 12 Minn. 192; *Wittenberg v. Mollyneaux*, 59 Neb. 203, 80 N. W. 824. The best sources of information reasonably accessible must be used to learn whether the witness himself cannot be found, otherwise his previous testimony is not admissible: *Mawich v. Elsey*, 47 Mich. 10, 10 N. W. 57. Evidence simply that such witness is reputed to have left the state is not sufficient to admit his former testimony: *Baldwin v. St. Louis etc. Ry. Co.*, 68 Iowa, 37, 25 N. W. 918. If the witness is only temporarily absent from the state, and it does not appear that he has been subpoenaed, or that any effort has been made to procure his testimony or personal attendance, his former testimony cannot be introduced: *Kellogg v. Secord*, 42 Mich. 318, 3 N. W. 868.

Where it has been impossible to secure the presence of a witness who has testified at the first trial of the case, it is proper to admit evidence of an unsuccessful effort to find such witness, in order to lay the foundation for admitting his testimony in the former trial: *Ballman v. Heron*, 169 Pa. St. 510, 32 Atl. 594. The testimony of a witness given on a former trial is admissible on a subsequent trial of the same action, if it is shown that a subpoena has issued

for such witness, and that an officer has made diligent effort to find and serve him within the county but has been unable to do so: *Spaulding v. Chicago etc. Ry. Co.*, 98 Iowa, 205, 87 N. W. 227. This is especially the rule when fortified with other evidence of an honest endeavor to locate the whereabouts of the absent witness: *Pilie v. Kenner*, 2 Rob. (La.) 95. Upon the preliminary inquiry in such cases as to whether the witness is domiciled out of the state, or is likely to remain out of the reach of the process of the court, his own declarations of intention are admissible, in connection with evidence of the fact of his departure or absence from the state: *King v. McCarthy*, 54 Minn. 190, 55 N. W. 690. Thus, the absence of the witness from the jurisdiction of the court is sufficiently shown to admit the reading of his former testimony in evidence by the affidavit of the officer into whose hands a subpoena has been placed for service on such witness, that he was unable to find him within the state, and was informed that he was in another state, supplemented by the testimony of the witness' attorney that he had been informed by his client that he was going to such other state, and that he had, just previous to the trial, received letters from him postmarked in such other state: *Wheeler v. Jenison*, 120 Mich. 422, 79 N. W. 643. Evidence that a witness a few months prior to the trial left for a foreign country with the intention of remaining there for two years, and that plaintiff had received letters from him dated in such country, is sufficient proof of his nonresidence to admit the introduction of his testimony given on a former trial of the case: *Wheeler v. McFerron*, 38 Or. 105, 62 Pac. 1015. If it is shown that a witness has removed from the state permanently, his testimony as taken and preserved on a former trial of the same case is admissible without a showing of the exercise of diligence to procure the deposition of such witness: *Emerson v. Burnett*, 11 Colo. App. 86, 52 Pac. 752. In order to admit the evidence of an absent witness given on a former trial, it must be first shown that such testimony is complete, and if it appears that the witness absented himself from that trial before he was fully examined, his testimony cannot be read in evidence: *Noble v. McClintock*, 6 Watts & S. 58.

c. *Qualifications of Witness.*—Although it has been held that if a person is offered as a witness to prove the testimony of a witness since deceased, given on a former trial of the same case, he cannot be permitted to testify, if he states that he can give only the substance of such testimony, but not the exact language of the witness: *Jackson v. Soude*, R. M. Charl't. 38; *Ephraims v. Murdock*, 7 Blackf. 10; *Warren v. Nichols*, 6 Met. 261; *Marsh v. Jones*, 21 Vt. 378, 52 Am. Dec. 67; *Williams v. Willard*, 23 Vt. 370; such a doctrine, without qualification, is undoubtedly untenable and unsound, as will be shown by authorities cited hereafter. The true rule, as sustained by numerous authorities, is, that the testimony of what a deceased witness swore to on a former trial of the same case is admissible, if the witness can state the whole substance of what was sworn to, al-

though he may not be able to give the exact words: *Gildersleeve v. Caraway*, 10 Ala. 260, 44 Am. Dec. 485. It is, however, essential that the witness called to give the testimony of a witness since deceased upon a former trial must be able to state the substance of the whole of the latter's testimony on the particular subject which he is called to prove. This must include the cross-examination of the deceased witness as well as his direct examination, and if the witness can testify only to what was sworn to by the deceased person in his examination in chief without giving the cross-examination, it cannot be received in evidence: *Harrison v. Charlton*, 42 Iowa, 573; *Fell v. Burlington etc. R. R. Co.*, 48 Iowa, 177; *Tibbetts v. Flanders*, 18 N. H. 284; *Wright v. Stowe*, 4 Jones, 516; *Buie v. Carver*, 73 N. C. 264; *Wolf v. Wyeth*, 11 Serg. & R. 149; *Kinnard v. Willmore*, 2 Heisk. 619. The rule is clearly stated in *Summons v. State*, 5 Ohio St. 326, that it is not essential to the competency of such evidence that it be given in the exact words of the deceased person, but while the witness is allowed to give the substance of the statements of the deceased person on the former trial, he is not allowed the latitude of giving their mere effect, and it is essential to the competency of the witness called to give this kind of evidence: 1. That he heard the deceased person testify on the former trial; and 2. That he has such an accurate recollection of the matter stated that he will, on his oath, assume or undertake to narrate in substance the whole matter sworn to by the deceased witness, in all its material parts, or that part whereof he may be called upon to prove.

The rule is so often applied that if a witness can state the substance of the whole testimony, or of the part that he is called to testify about, given by a witness since deceased, on a former trial, he is competent to testify, although he cannot repeat the exact language of the deceased, that it may be said to be of universal application, and that this is the test to be applied to the competency of the witness: *Buch v. Rock Island*, 97 U. S. 693; *Clealand v. Huey*, 18 Ala. 343; *Trammell v. Hemphill*, 27 Ga. 525; *Hutchins v. Corgan*, 59 Ill. 70; *Chicago etc. R. R. Co. v. Harmon*, 17 Ill. App. 640; *Horner v. Williams*, 23 Ind. 37; *Woods v. Gevecke*, 28 Iowa, 561; *Small v. Chicago etc. R. R. Co.*, 55 Iowa, 582, 592, 8 N. W. 437; *Gannon v. Stevens*, 13 Kan. 447; *Thompson v. Blackwell*, 17 B. Mon. 609; *Lime Rock Bank v. Hewett*, 52 Me. 531; *Garrott v. Johnson*, 11 Gill & J. 173, 35 Am. Dec. 272; *Burson v. Huntington*, 21 Mich. 415; *Costigan v. Lunt*, 127 Mass. 354; *Smith v. Natches Steamboat Co.*, 1 How. (Miss.) 479; *Young v. Dearborn*, 22 N. H. 372; *Sloan v. Somers*, 20 N. J. L. 66; *Crawford v. Loper*, 25 Barb. 449; *Carpenter v. Tucker*, 98 N. C. 316, 3 S. E. 831; *Wagers v. Dickey*, 17 Ohio, 439, 49 Am. Dec. 467; *Cornell v. Green*, 10 Serg. & R. 14; *Hepler v. Mount Carmel Sav. Bank*, 97 Pa. St. 420, 39 Am. Rep. 813; *Thurmond v. Trammell*, 28 Tex. 371, 91 Am. Dec. 321; *Caton v. Lenox*, 5 Rand. 31. The testimony of the deceased witness at a former trial of the same case may be proved by anyone who is competent to testify,

and who heard and can remember it: *Loughry v. Mail*, 34 Ill. App. 523; *Solomon R. R. Co. v. Jones*, 34 Kan. 443, 8 Pac. 730; *Costigan v. Lunt*, 127 Mass. 354; *State v. McDonald*, 65 Ma. 466; *Glass v. Beach*, 5 Vt. 172. A person who cannot give the language of the deceased witness substantially as he gave it should not be permitted to testify to it: *Corey v. Janes*, 15 Gray, 453. The witness must be able and profess to state all the facts testified to by the deceased witness: *Black v. Woodrow*, 39 Md. 194. And, if after rehearsing the testimony the witness admits that he cannot give the whole of it, or the substance thereof, he should not be permitted to testify: *Emery v. Fowler*, 39 Me. 326, 63 Am. Dec. 627. A witness who does not remember that the deceased testified at a former trial is not competent to testify that he did not: *Kinnard v. Willmore*, 2 Heisk. 619. In order to be competent to prove the testimony given by the deceased witness, the present witness must be able to give the substance of the former evidence from memory, though he may use his own or another's notes thereof to refresh his memory: *Waters v. Waters*, 35 Md. 531; *Trimmer v. Trimmer*, 90 N. Y. 675; *Carpenter v. Tucker*, 98 N. C. 316, 3 S. E. 831; *Yancey v. Stone*, 9 Rich. Eq. 429. The testimony of a master in chancery that in a former suit involving the same issue he intended to take, and believed that he had taken, the exact words of a witness, since deceased, is admissible, together with the evidence so taken: *Yale v. Comstock*, 112 Mass. 267. A witness is competent to prove what another witness since deceased did not testify to, though he may not be able to give the substance of all that such witness testified to: *Bemus v. Howard*, 3 Watts, 255. Although the evidence of a deceased witness at a former trial may be proved in a subsequent trial, the legal effect of such evidence cannot be proved: *Bowie v. O'Neale*, 5 Har. & J. 226. Defendant's admission of what he has testified to in a former suit dispenses with proof of such testimony by other witnesses: *Lamb v. Briggs*, 22 Neb. 138, 34 N. W. 217.

IV. Mode of Proof.

a. *Notes of Testimony.*—As we have already shown, it is well settled that where the testimony of a deceased witness is offered, the substance of his whole testimony must be proved: *Woods v. Keyes*, 14 Allen, 236, 92 Am. Dec. 765; *Ward v. Dow*, 44 N. H. 45; *Odell v. Solomon*, 23 Jones & S. 410; *Philadelphia etc. R. R. Co. v. Spearman*, 47 Pa. St. 300, 86 Am. Dec. 544; and if any parts of it are irrelevant, the court may reject them, but the witness cannot determine the relevancy of the portions which he omits: *Magee v. Doe*, 22 Ala. 699. One of the methods often resorted to for the production of the testimony of the deceased or absent witness is the notes thereof taken at the former trial by the presiding judge or counsel, or the witness, and it is well settled that minutes of the testimony of a witness since deceased are not admissible, in the absence of proof of their accuracy: *Morris v. Hammerle*, 40 Mo. 489. And the judge's notes of the testimony of a witness since deceased

are not admissible per se on the subsequent trial of the same case, but must be proven to be correct: *Simmons v. Spratt*, 23 Fla. 370, 1 South. 860; *Huff v. Bennett*, 4 Sand. 120, 6 N. Y. 337; *Livingston v. Cox*, 8 Watts & S. 61. Some cases assert the broad proposition that notes of the former testimony of a deceased witness, taken by the judge, are not admissible to prove such testimony: *Citizens' State Bank v. Adams*, 91 Ind. 280; *Schafer v. Schafer*, 93 Ind. 586; *Yancey v. Stone*, 9 Rich. Eq. 429. Even when certified by the judge to be a true copy of such testimony: *Miles v. O'Hara*, 4 Binn. 108. A justice's notes of the testimony of a witness since deceased are inadmissible where the justice testifies that he thinks that they contain all the facts stated by the witness, but probably not all of his words: *Elberfeldt v. Waite*, 79 Wis. 284, 48 N. W. 525. The true rule we take to be is, that the minutes or notes of the judge of the testimony of a witness since deceased, given on a former trial, are not of themselves evidence, but if the judge making them can testify that they are correct, or that he has no doubt of their being so, they are admissible. If he cannot testify that they are full and accurate, they cannot of themselves be regarded as evidence: *Huff v. Bennett*, 4 Sand. 120, 6 N. Y. 337. This is only in keeping with the established rule that minutes of the testimony of a deceased witness taken at a former trial by one who states that he tried to take down all that the witness said, not the substance alone, are admissible, although the witness will not swear that he took down every word: *Clark v. Vorce*, 15 Wend. 193, 30 Am. Dec. 53; *Van Buren v. Cockburn*, 14 Barb. 118; *Martin v. Cope*, 3 Abb. App. Dec. 182; *Cornell v. Green*, 10 Serg. & R. 14. The notes of an attorney, taken at a former trial between the same parties, of the testimony of a witness since deceased, are not admissible as evidence of such testimony per se in a subsequent trial: *Waters v. Waters*, 35 Md. 531. But such notes, if sworn to be correct, and to contain all of the evidence given by the deceased witness, or the whole of the substance thereof, are admissible to prove his testimony, although counsel making such notes does not recollect such testimony independently of his notes: *Mineral Point R. R. Co. v. Keep*, 22 Ill. 9, 74 Am. Dec. 124; *Jones v. Ward*, 3 Jones, 24, 64 Am. Dec. 590; *Ashe v. De Rossett*, 5 Jones, 299, 72 Am. Dec. 552; *Chess v. Chess*, 17 Serg. & R. 409; *Moore v. Pearson*, 6 Watts & S. 51; *Rhine v. Robinson*, 27 Pa. St. 30; *Philadelphia etc. R. R. Co. v. Spearen*, 47 Pa. St. 300, 86 Am. Dec. 544; *Whitcher v. Morey*, 39 Vt. 460; *Earl v. Tupper*, 45 Vt. 275.

b. *Bill of Exceptions or Brief of Evidence.*—Another method of proving the testimony of a witness since deceased, or out of the jurisdiction of the court, given on a former trial, is by producing and admitting it as preserved in a brief of evidence taken on the first trial. This rule prevails in Georgia, where it is maintained that what a witness since deceased or absent swore to on a former trial, and taken down in a brief or testimony, either verified by the oath of one who heard it given, or agreed upon by counsel or the parties.

as being correct is competent evidence on the subsequent trial: *Riggins v. Brown*, 12 Ga. 271; *Walker v. Walker*, 14 Ga. 242; *Adair v. Adair*, 39 Ga. 75; *Jackson v. Jackson*, 47 Ga. 100; *Lathrop v. Adkisson*, 87 Ga. 339, 13 S. E. 517; *City of Columbus v. Ogletree*, 102 Ga. 294, 29 S. E. 749; *Denson v. Denson*, 111 Ga. 809, 35 S. E. 680; *Owen v. Palmour*, 111 Ga. 885, 36 S. E. 969. The testimony of such witness may be proved in the subsequent trial by a "case" settled, allowed and certified as containing all of the evidence produced at the former trial: *Slingerland v. Slingerland*, 46 Minn. 100, 48 N. W. 605; *Dwyer v. Bassett*, 1 Tex. Civ. App. 513, 21 S. W. 621. But in order that the testimony may be thus admitted, the death of the witness must be proved, and the testimony contained in the agreed statement of facts must be shown to be correct: *Dwyer v. Rippetoe*, 72 Tex. 520, 10 S. W. 668. A transcript of the testimony of the deceased witness given on the former trial is admissible on the second if it is proved that he testified, is since dead, and that the transcript of his testimony is correct: *Bredt v. Simpson*, 59 Ill. App. 333; *O'Connor v. Mahoney*, 159 Ill. 69, 42 N. E. 378; *Cooper v. Ford* (Tex. Civ. App.), 69 S. W. 487. There is great conflict in the authorities as to whether the testimony of an absent witness or a witness since deceased, taken on a former trial and preserved in a bill of exceptions, can be reproduced and admitted at the second or subsequent trial, by reading from such bill of exceptions. Many cases hold that statements contained in a bill of exceptions of the testimony of a witness since deceased or absent are unqualifiedly admissible in evidence on the second trial: *Cantrell v. Hewlett*, 2 Bush, 311; *Coughlin v. Haensler*, 50 Mo. 126; *Corby v. Wright*, 9 Mo. App. 5; *Franklin v. Gomersall*, 11 Mo. App. 306; *Bruce Lumber Co. v. Hoos*, 67 Mo. App. 264; *Wilson v. Noonan*, 35 Wis. 321. Other cases qualify the rule by adding that in order to make the testimony admissible, it must be first shown that the testimony of the witness as contained in the bill is correct as taken at the former trial, and that he is either dead, unable to attend the trial, or without the jurisdiction of the court: *Torrey v. Burney*, 113 Ala. 496, 21 South. 348; *Plano Mfg. Co. v. Parmenter*, 56 Ill. App. 258; *Woollen v. Wire*, 110 Ind. 251, 11 N. E. 236; *Fisher v. Fisher*, 131 Ind. 462, 29 N. E. 31; *Scoville v. Hannibal etc. R. R. Co.*, 94 Mo. 84, 6 S. W. 654; *Davis v. Kline*, 96 Mo. 401, 9 S. W. 724. Other cases maintain the strict doctrine that a bill of exceptions is not admissible to show what the testimony of a witness since deceased or out of the jurisdiction of the court was at the former trial. Such evidence must be shown by the testimony of sworn living witnesses, wherever the latter doctrine prevails: *Simmons v. Spratt*, 26 Fla. 449, 8 South. 123; *Stern v. People*, 102 Ill. 540; *Kankakee etc. R. R. Co. v. Horan*, 131 Ill. 288, 23 N. E. 621; *Illinois Central R. R. Co. v. Ashline*, 171 Ill. 313, 49 N. E. 521; *City of Elgin v. Welch*, 23 Ill. App. 185; *Montgomery v. Handy*, 63 Miss. 43; *Kirk v. Mowry*, 24 Ohio St. 581; *Edwards v. Gimbel*, 202 Pa. St. 30, 51 Atl. 357.

HALL v. KELLER.

[64 Kan. 211, 67 Pac. 518.]

CONSIGNOR AND CONSIGNEE—Liability for Failure of Title.—Neither the payee nor a bank collecting a draft drawn by the consignor of grain and accompanying a bill of lading is liable to the consignee accepting and paying the draft for a failure of title to the property described in such bill. (pp. 211, 212.)

R. L. King, Thomas O. Kelley, and Karnes, New, Hall & Krauthoff, for the plaintiffs in error.

Keller & Dean, for the defendants in error.

212 SMITH, J. This was an action brought by the firm of Hall & Robinson against Keller & Dean and the First National Bank of Marion, to recover the sum of six hundred and sixty-six dollars and interest. The facts in the case may be stated briefly: Keller & Dean, a firm of lawyers in Marion, brought several actions for different clients against a farmer in Marion county, and levied writs of attachment on about two thousand bushels of corn. The writs were served by one Jacob Konrath, a constable. While he had the corn in his possession, it was agreed between the parties to the actions that it should be shipped to Kansas City, in order to obtain the highest market price. Konrath loaded the grain into cars of the Chicago, Rock Island and Pacific Railway Company, and consigned it to the order of himself at Kansas City, and took a bill of lading for each car (four in number). On the following day he drew a sight draft on Hall & Robinson, graindealers, in Kansas City, as follows:

“FIRST NATIONAL BANK OF MARION.

“Marion, Kan., August 28, 1890.

“At sight, pay to the order of Keller & Dean \$716 and no-100 dollars, value received, and charge to the account of

“JACOB KONRATH.”

“To Hall & Robinson, Kansas City, Mo.”

This draft was indorsed thus: “Pay to First National Bank of Marion, or order.

“KELLER & DEAN.”

The amount of the draft (seven hundred and sixteen dollars) was credited to Keller & Dean on the books of the bank. The draft, with bills of lading attached, was then forwarded

by the First National Bank of Marion to the American National Bank at Kansas City, indorsed by the former for collection. Upon its arrival there, Hall & Robinson ²¹³ accepted it for the sum of six hundred and sixty-six dollars only, notifying the drawer (Konrath). This change of amount was not objected to by the drawer or indorsers, and, for the purpose of this case, the draft may be treated as having been drawn for six hundred and sixty-six dollars in the first instance. The above amount was collected by the American National Bank from Hall & Robinson and remitted to the First National Bank of Marion.

On the day that the corn was shipped, Konrath wrote a letter to plaintiffs in error, as follows:

"Lehigh, Kan., August 28, 1890.

"Hall & Robinson, Kansas City, Mo.:

"Gentlemen: I have shipped you to-day four cars corn, containing 2108 bus. of corn; have drawn on you \$716, which you will please honor when presented. Sell it for the best you can and make return to me at Lehigh, Kan.

"Yours truly,

"JACOB KONRATH."

"Corn is billed to my name. I indorse bill of lading."

The corn covered by bills of lading never reached Kansas City. It was replevied and taken from the possession of the carrier by another bank, under a paramount lien. It appears that the bills of lading were indorsed in blank by Jacob Konrath, the shipper. There was a judgment entered against the plaintiffs below for costs and they have prosecuted error here.

The determining question in the case is whether Keller & Dean and the First National Bank of Marion, under the facts stated, became liable to the plaintiffs in error for a failure of title in the property shipped. There are two decisions called to our attention which hold that a bank, by its act of cashing a draft payable to its order, with bills of lading attached, becomes the owner of the property and undertakes to carry out the ²¹⁴ contract made by the drawer (the shipper) with the drawee (the consignee): *Landa v. Lattin*, 9 Tex. Civ. App. 246, 46 S. W. 48; *Finch v. Gregg*, 126 N. C. 176, 35 S. E. 251. In both of these cases the grain covered by the bills of lading attached to the drafts which the banks cashed was of inferior quality, and the banks were held liable to the consignees and acceptors of the drafts, after the same had been paid, for the difference in value between the good quality of grain which the consignor agreed to ship and the bad quality actually received.

We are not favorably impressed with the logic of the opinions in these cases. We think their weakness lies in the fact that the banks are treated as purchasers of the grain. This could not be true, for the property shipped had already been sold to the consignees, the acceptors of the drafts, and the legal effect of the acceptance of such negotiable paper in the hands of an indorsee for value at the time seems to have been overlooked. The right to the price only was, in our judgment, transferred to the bank in the present case, and it held possession of the corn as security for the money it had advanced: *Tolerton etc. Co. v. Anglo-California Bank*, 112 Iowa, 706, 84 N. W. 930. See, also, *Halsey v. Warden*, 25 Kan. 128.

The doctrine of the Texas and North Carolina cases is shown in the Iowa case cited to be unsound in principle. The court said: "The two cases cited [referring to those above mentioned] stand alone in holding the purchaser of a draft with the bill of lading attached liable on a warranty made by the assignor, and the line of reasoning pursued to reach this conclusion is so at variance with well-established elementary principles of law that we decline to accept the rule they announce."

²¹⁵ In the case from which we have quoted, the rule of the law of commercial paper is applied, to the effect that after the holder of a negotiable draft, with bill of lading attached, has secured an acceptance of such draft by the drawee and consignee, he cannot be affected by any equities existing between such consignee and the seller of the goods: *Arpin v. Owens*, 140 Mass. 144, 3 N. E. 25.

In an exhaustive note to the case of *Finch v. Gregg*, found in 49 L. R. A. 679-683, the annotator cites and comments on a large number of well-considered cases which uphold the doctrine of the Iowa decision above referred to, and, in conclusion, says: "From these cases, all of which hold that after a draft attached to a bill of lading is accepted the consignee becomes absolutely liable on the acceptance, and that after payment thereon is made he cannot recover it back, notwithstanding any failure of consideration between him and the drawer, it would seem that the decisions in the main case, and in *Landa v. Latin*, 9 Tex. Civ. App. 246, 46 S. W. 48, were based on a wrong principle, and that if the right principle had been considered the decisions must have been different."

To fix a liability upon the bank, or upon Keller & Dean, under the circumstances of the present case, would not only violate well-settled rules of the law governing commercial paper,

but would also tend to decrease the immense volume of business which is carried on by shippers of stock, grain and other commodities, by restricting that freedom with which banks advance money to the drawers of such drafts with bills of lading attached. If banks in whose favor such bills are drawn are made liable for damage on account of the defective quality of the property shipped, ²¹⁶ and covered by the bill of lading, or for failure of title in the drawer of the draft, a serious impediment would be placed in the way of shippers who need a part or all of the price of the commodity sold before its arrival in the market to which it is consigned. To hold with the plaintiff in error would, to use the language of the author of the note in *French v. Gregg*, 49 L. R. A. 679, "undoubtedly cause a revolution in commercial circles."

The judgment of the court below will be affirmed.

All the justices concurring.

**LIABILITY OF ASSIGNEE OF BILL OF LADING WITH DRAFT
ATTACHED TO CONSIGNEE FOR FAILURE OF TITLE TO
OR DEFECT IN GOODS, OR FAILURE OF CONSIDERATION.**

Although the authorities directly in point upon the topic under consideration are meager indeed, and in hopeless conflict, we feel assured that the principles announced in the principal case must, in the end, prevail. This doctrine, briefly stated, is, that after a draft attached to a bill of lading, indorsed by the consignor to an assignee, is accepted, the consignee becomes absolutely liable on the acceptance, and, after payment thereon, he cannot recover either from the payee or from the person or bank paying the draft for a failure of title in the drawer thereof to the property shipped, or for a breach of warranty as to the quantity or quality thereof.

We believe with Mr. Justice Smith, who wrote the opinion in the principal case, that to maintain the contrary doctrine and to fix a liability upon the party paying the draft or upon the payee under such circumstances "would not only violate well-settled rules of the law governing commercial paper, but would also tend to decrease the immense volume of business which is carried on by shippers of stock, grain and other commodities, by restricting that freedom with which banks advance money to the drawers of such drafts with bills of lading attached. If banks in whose favor such bills are drawn are made liable for damage on account of the defective quality of the property shipped and covered by the bill of lading, or for the failure of title in the drawer of the draft, a serious impediment would be placed in the way of shippers who need a part or all of the price of the commodity sold before its arrival in the market to which it is consigned."

The doctrine so severely criticised in the principal case and other cases—namely, that the assignee of a bill of lading with draft attached is, in case he receives payment of the draft, subject to an action for the return of the money if the property covered by the bill of lading does not comply with the contract—is maintained by the case of *Finch v. Gregg*, 126 N. C. 176, 35 S. E. 251, holding that if the shipper of goods assigns the bill of lading, with draft attached upon the consignee, such assignee takes the contract of the shipper and stands in his shoes, with the same rights, and that the rights of the consignee are not impaired or disturbed by the change of the ownership in the property, and he has the same defenses against the assignee as against the shipper. In another case (*Landa v. Lattin*, 19 Tex. Civ. App. 246, 46 S. W. 48) it appeared that a vendor of wheat, under a contract warranting its quality, shipped it, taking a bill of lading to the shipper's order, with a draft for the purchase price attached, which he transferred to a bank and received credit therefor, the bank forwarding the draft and bill of lading, and delivering the latter on payment of the draft by the purchaser, who had no previous opportunity to examine the grain, which proved defective in quality. It was held that the bank acquired the right of property subject to the burdens imposed by the contract of sale, and was liable to the consignor for damages for a breach of the warranty in the quality of the grain. Both of the cases above cited are based on the holding in *Columbian Nat. Bank v. White*, 65 Mo. App. 677, to the effect that where the shipper assigns the bill of lading and accompanying draft, the title to the property shipped at once vests in the assignee, but such transfer of title does not disturb or impair the defenses of the consignee against the transferee and payor of the draft, which defenses remain the same against him as against the assignor.

On the other hand, the doctrine announced in the principal case was probably first promulgated in the well-considered case of *Tolerton v. Anglo-California Bank*, 112 Iowa, 706, 84 N. W. 930, where it was decided that a bank purchasing a draft from the consignor of goods accompanied with the bill of lading, after collecting the full amount of the draft, is not liable to the consignee of the goods for a breach of the warranty made by the consignor, because after the holder of a negotiable draft has secured payment from the drawee, he is unaffected by any equities originally existing between the drawer and drawee.

In delivering the opinion in this case Mr. Justice Waterman said: "The facts, so far as we have to consider them under the issue upon which we make the case hinge, may be accepted as set out by plaintiff. There was a sale of these goods with a warranty, which was broken. Defendant was the payee of the draft drawn by the canneries company on plaintiff for the price, with the bill of lading attached, and as such received payment of the full purchase price. The question to be determined is whether defendant is now liable

in damages for the breach of the canneries company's warranty. It must be confessed that this theory of its liability is fully supported by the case of *Landa v. Lattin*, 19 Tex. Civ. App. 246, 46 S. W. 48, and that the doctrine of this case has been adopted and followed by the supreme court of North Carolina in *Finch v. Gregg*, 126 N. C. 176, 35 S. E. 251, decided since the trial below. If we were prepared to yield our assent to the line of reasoning pursued in these cases, we should have to affirm this judgment. These decisions proceed upon the theory that the assignee stands in all respects in the shoes of his assignor, and to this broad doctrine we cannot agree. While the rights of such an assignee are to be measured by those of his assignor, his liability is not necessarily the same.

"Defendant bank could not have compelled payment by plaintiff of any greater sum than could have been collected by the canneries company, but on what theory can we say it is liable on a contract of warranty which it never made? The rule of the *Landa* case is founded on the thought that the transfer of the draft and bill of lading to the bank amounted to a sale of the goods, and that the bank as a purchaser undertook to deliver the goods and carry out the canneries company's contract with plaintiff, and because of these facts it necessarily assumed the contract of warranty, although it may have been in fact ignorant that any warranty was made. We do not think, even as the proposition is thus stated, the premises justify the conclusion. But the premises are not correct. The transaction between the canneries company and defendant was not and could not be a sale of the goods, for they had already been sold to plaintiff, and it was the intention of all parties that such sale to plaintiff should be consummated by delivery. What was in fact done by the assignment of the draft and bill of lading was to transfer to the bank the canneries company's right to the price, and to give it the possession of the goods as security. Manifestly, while the bank could collect no more than its assignor would have been entitled to, the character of its engagement was not such as to impose upon it any liability to the buyer which it did not expressly assume. One who purchased an account against another takes it subject to defenses, but not to affirmative claims of the debtor on some collateral agreement with the original creditor. The two cases cited stand alone in holding the purchaser of a draft with the bill of lading attached liable on a warranty made by the assignor, and the line of reasoning pursued to reach this conclusion is so at variance with well-established elementary principles of law that we decline to accept the rule they announce.

"2. If there is any liability on defendant's part to plaintiff, it must be on the ground that it has received money which it cannot equitably retain. The canneries company could have collected only the price of the goods, less the damages for breach of warranty. More than this has been paid to defendant. If plaintiff has any standing here, it is to recover this excess paid, on the theory just stated.

But the draft given the bank was negotiable, and it is a well-established rule of law that, after the holder of a negotiable draft with bill of lading attached has secured an acceptance of such draft from the drawee and consignee, he is unaffected by any equities originally existing between such consignee and the seller of the goods. In such a case the liability of the drawee becomes fixed to the payee: *Arpin v. Owens*, 140 Mass. 144, 3 N. E. 25; *Flournoy v. Bank*, 78 Ga. 222, 2 S. E. 547; *Nowak v. Stone Co.*, 78 Ill. 307; *Law v. Brinker*, 6 Colo. 555; *Vanstrum v. Liljengren*, 37 Minn. 191, 33 N. W. 555; *Hays v. Hathorn*, 74 N. Y. 486; *Shafer v. Bronenberg*, 42 Ind. 89; *Randolph on Commercial Paper*, 1876. It is said in the first of these cases: "The payee of an accepted bill holds the same relation to the acceptor that an indorsee of a note holds to the maker." Under this rule, the plaintiff, after an acceptance of the draft, could not have set up against the bank any claim for breach of warranty made by the canneries company, and if this is the effect of an acceptance, it certainly is of a payment": *Tolerton v. Anglo-Californian Bank*, 112 Iowa, 708, 84 N. W. 930.

In *Schreiber v. Andrews*, 101 Fed. 763, the court, after laying down the rule fortified by a citation of cases, that "the title to goods consigned to a purchaser by the indorsement of the bill of lading and an attached draft for the purchase price passes to the vendee when the price is paid," proceeds to decide that if a consignor delivers goods at the point of shipment, takes bills of lading in his own name, indorses them, draws for and receives payment for the full purchase price before inspection, the title passes to the consignee when the draft is paid, and entitles him to recover of the consignor an overpayment for goods delivered, and damages for a breach of warranty of the grade of goods shipped. Nothing is here said implying any liability on the person or bank who paid the draft, but the liability is placed where it really belongs—namely, on the consignor for his breach of contract: *Schreiber v. Andrews*, 101 Fed. 766. Other cases uphold the rule contended for in the principal case. Thus, in *Goetz v. Bank of Kansas City*, 119 U. S. 551, 7 Sup. Ct. Rep. 318, it appeared that a bank discounted several drafts with bills of lading attached thereto, and the consignee, after accepting and paying several of the drafts, found that the bills of lading were forged, and refused to pay one draft already accepted by him, and brought action against the bank to recover the amount of the drafts paid by him. The court held that the bank did not, by discounting the drafts or by indorsing invoices attached to the bills of lading, "for collection," guarantee the genuineness of the bills of lading, and that its right to recover the accepted drafts was not defeated by mere failure to inquire into the consideration of the draft, although it had knowledge of rumors of the bad reputation of the drawer. The above case was decided on the authority of *Hoffman v. Bank of Milwaukee*, 12 Wall. 181, where it was further held that a bank or payee who discounts a draft at the request of

the drawer is regarded as a stranger to the acceptor, as to the consideration for the acceptance, and if the acceptance is absolute in its terms, and the draft was received in good faith and for value, the payee may recover, though there was no consideration for the acceptance or such consideration had failed. It was also held that it was immaterial whether the draft was accepted while in the hands of the drawer at his request, or after it had passed into the hands of the payee at his request. And to the same effect is *United States v. Bank of Metropolis*, 15 Pet. 398. The acceptor of a bill of exchange attached to a bill of lading, is bound to know the drawer's signature, and cannot, after acceptance, recover money paid to the payee in case of a forged or fictitious bill of lading: *Young v. Lehman*, 63 Ala. 519; *Randolph v. Merchants' Nat. Bank*, 7 Bart. 458. In such case the drawee of the draft is liable on his acceptance, whether the payee become a holder of the draft before its acceptance or not: *Craig v. Sibbett*, 15 Pa. St. 238. The drawee is not entitled to recover of the payee the amount of a bill of exchange which he has accepted and paid, upon the ground that he has paid it under a mistake of fact as to the nature or value of the security from the drawer, when the security accompanying the bill proves to be fictitious and worthless: *First Nat. Bank v. Burkham*, 32 Mich. 328. These cases, we think, are conclusive of the justness and legality of the rule contended for in the principal case, that neither the payee nor a bank collecting a draft drawn by the consignor of goods, with a bill of lading attached thereto, is liable to the consignee after his acceptance and payment of the draft, for a failure of title to the property described in the bill of lading, or for a breach of warranty as to the quality or quantity of the goods shipped, or for a failure of consideration in whole or in part, from any cause, between the consignor and the consignee.

PARKER v. HUGHES.

[64 Kan. 216, 67 Pac. 637.]

ELECTIONS.—If on ballots on which the same name appears two or more times as that of a candidate for the same office, a stamp is placed opposite such name in two of the places in which it so appears, such double markings do not constitute distinguishing marks nor a marking of more names than there are persons to be elected to the office, but only a marking of the same name more times than is necessary, and the ballots should be counted. (p. 218.)

ELECTIONS—Ballots.—A distinguishing mark, to warrant the rejection of a ballot, must be found to have been made for the purpose of identification. (p. 221.)

ELECTIONS.—If a Package of Returns from an Election Precinct Contains More Ballots than were Counted Therein, and it is not possible to distinguish those which were not counted from those that were, the whole package is not to be rejected, but the surplus bal-

lots should be deducted from the count of both parties in proportion to the vote for each in the precinct, but if, on inspection, it is found that so many of the ballots must be rejected that the number remaining is less than the number voted in the precinct, the balance of the ballots should be counted for the candidates for whom they were respectively voted. (p. 222.)

ELECTIONS—Distinguishing Marks.—Ballots marked with ink or with a pencil other than black, or with a single stroke instead of a cross, or with a cross after a name, and also with a cross in the square after the blank space on the right of the ballot without any name being written there, must all be rejected as bearing distinguishing marks. The same result must follow where the ballot has lines drawn across it or names partially or wholly obliterated by pencil-marks, or names or initials written thereon. (pp. 221, 222.)

ELECTIONS—Ballots, When Must be Rejected.—If a Statute Makes it Criminal to so mark a ballot that it can be distinguished, such statute necessarily implies that such ballot cannot be counted. (pp. 219, 222.)

G. C. Clemens, David Overmeyer, and Ferry & Doran, for the plaintiff.

Garver & Larimer, Redden, McKeever & Hayden, and F. P. Lindsay, for the defendant.

217 CUNNINGHAM, J. At the spring election of 1901, in the city of Topeka, plaintiff and defendant were opposing candidates for the office of mayor. The plaintiff had received the nomination from the Democratic party and had also been nominated at a meeting of citizens, so that his name appeared twice upon the official ballot. The defendant was the regular nominee of the Republican party, and had been declared elected by the proper board of canvassers: *Hughes v. Parker*, 63 Kan. 297, 65 Pac. 265. This is an original proceeding in quo warranto to determine whether plaintiff or defendant was, in fact, elected to the office of mayor at said election. Both parties allege that they received a majority of the votes cast and are entitled to hold the office.

The court appointed James E. Larimer, Esq., commissioner to hear evidence, count the ballots and ascertain the number and character of those disputed. This he has done in a most painstaking and careful manner, and from his report we find that, of the votes cast at said election concerning which no objections were made by either party, Mr. Hughes received six thousand two hundred and eighty-five Mr. Parker six thousand one hundred and twenty-five; that, in addition to this number, there were two hundred and seventy-four ballots, to which objections for various causes were made by both parties, two hundred and seventeen of these objections being made on behalf of Mr. Hughes and fifty-seven on behalf of Mr. Parker.

REPUBLICAN PARTY.	DEMOCRATIC PARTY.	CITIZENS' TICKET.	INDEPENDENT.
Electors will make a cross-mark, thus, X, in the square at the right of the name of the candidate for whom they wish to vote.	Electors will make a cross-mark, thus, X, in the square at the right of the name of the candidate for whom they wish to vote.	Electors will make a cross-mark, thus, X, in the square at the right of the name of the candidate for whom they wish to vote.	Electors will make a cross-mark, thus, X, in the square at the right of the name of the candidate for whom they wish to vote.
For Mayor, J. W. F. HUGHES.	For Mayor, ALBERT PARKER.	For Mayor, ALBERT PARKER.	For Mayor, <input type="checkbox"/>

From the second precinct of the first ward there ²¹⁸ came a package of thirty-six ballots, which package was marked, "This package contains defective or objected to ballots not voted." From the evidence taken, it reasonably appears that twenty-nine of these ballots were put into the ballot-box, and the probabilities are that this package was made up of seven ballots which, for some cause or other, had been returned by the voters to the judges before they were voted, and the other twenty-nine were ballots which came out of the ballot-box, but which had been put aside during the count of the ballots by the judges of election, because their counting had been objected to, and then finally had been gathered together and placed in the package marked as above.

The two hundred and seventy-four ballots were imperfect for a great variety of reasons, the greater part of which were based upon the claim made by the defendant that "double marked" ballots—that is, those on which the name of Mr. Parker was marked in both the Democratic and Citizens' column, should not be counted. This class of votes, so far as they relate to the office of mayor, will be illustrated by a copy of the ticket, printed on this page.

The defendant claims that these should not be counted because such double markings constitute distinguishing ²¹⁹ marks, within the meaning of the statute; and, further, because they are vicious, under the provisions of the statute which provides that, "if a voter marks more names than there are persons to be elected to an office, his vote shall not be counted for such office." The court, however, is of the opinion that neither of these claims is well founded; that in this case the voters did not mark more names than there were persons to be elected to an office; they only marked the same name more times than was necessary.

The majority of the court, while not agreeing upon the rea-

sons therefor, arrive at the same conclusion, that such ballots are not invalid because of being double marked. The chief justice and Mr. Justice Pollock arrive at this conclusion from the following reasoning: Section 25 of the Australian ballot law, chapter 129 of the Laws of 1897, specifically points out certain ballots that shall not be counted if found marked in the manner therein forbidden. This list prohibits the use of ink or pencil of any other color than black, and requires, by reference to section 22, that the mark used to distinguish the voter's choice shall be a cross, and they think that this list of acts, so enumerated, is exclusive of all others; that the express mention of them for this purpose implies that others are excluded; that, had the legislature intended that ballots should be excluded for other reasons than those mentioned and the voter thus disfranchised, it would have said so and not left it to inference; that, there being no statute requiring the rejection of ballots because of distinguishing marks, no ballot may be rejected because of such marks. True, section 27 of this law makes the act of placing such marks upon the ballot a penal one, and while the general law of the state is that an act done in violation of a criminal statute is a nullity, ²²⁰ this rule does not here obtain, for the reason that it is overborne by the stronger one, that the legislature having designated certain ballots that must be rejected, those are the only ones that can be rejected. This view will be found well supported by the following authorities where the provisions of the Australian ballot system have been construed and applied: Wigmore's Australian Ballot System, 2d ed., 193 et seq.; *People v. Board of Canvassers*, 156 N. Y. 36, 50 N. E. 425; *Attorney General v. Glaser*, 102 Mich. 406, 61 N. W. 648; *Sawin v. Pease*, 6 Wyo. 92, 42 Pac. 750; *State v. Fawcett*, 17 Wash. 188, 49 Pac. 349; *Nicholls v. Barrick*, 27 Colo. 432, 62 Pac. 202. Clearly, under this reasoning, the double-marked ballots must be counted.

Mr. Justice Smith is of the opinion that no right to have the vote counted in a candidate's favor ought to spring from a criminal act on the part of the voter, so that, if it appears that a mark has been placed upon a given ballot for the purpose of distinguishing it, such ballot cannot be counted. The placing of names or initials upon the ballot and the making of cross-marks in the squares opposite the blank spaces with no names written therein are cited as instances of such distinguishing marks, these making it apparent that the voter intended to violate the law. But the double marking of the same name, where that name has been printed twice, and thereby an implied invi-

tation extended to the voters so to mark, is not of itself such a distinguishing mark. While section 27 of chapter 129 of the Laws of 1897 makes it a penal act for a voter to place on his ballot "any character or mark for the purpose of identifying said ballot," he feels sure that no court would sustain a conviction under this provision of any one of the one hundred and seventy-six electors who voted ²²¹ these double marked ballots, upon their admission of the fact; hence, because these voters would not be liable to the punishment under this penal provision for voting these double marked ballots, he thinks that they should be counted; that, as regards other irregular and questionable markings on the ballots, the judges of election or of courts called upon to count the same must in each case determine from an inspection of the ballot what the intention of the voter was—whether such mark was intended as a distinguishing one or not.

Mr. Justice Ellis is of the opinion that not only must those ballots which are marked in the manner forbidden by section 25 be excluded, but also ballots marked in contravention of the penal section 27—that is, a ballot bearing a distinguishing mark purposely made should be rejected if the mark is of such nature or is so placed on the ballot that the judges or courts might find, in the absence of testimony, or upon testimony if offered, that there were reasonable grounds for believing that such mark was made by the voter with the intent that his ballot should be distinguished from others in the box; that, in determining what ballots should be counted, the court should look at the questioned one, and from such inspection, aided by the notorious facts and circumstances of the election at which it was cast, determine whether the questioned mark was intended by the voter as a distinguishing mark or not, and if, upon such inspection and consideration, aided by evidence aliunde if offered, the court should conclude that the mark was made for the purpose of distinguishing the ballot, or might be reasonably thought so to be intended, the ballot should not be counted. In this case, applying this rule, the conclusion is reached that the double-marked ballots ²²² should all be counted for Mr. Parker. The justice whose views have just been outlined lays down four rules to govern in the counting of questioned ballots. He would exclude: 1. Those where ink or pencil other than black has been used to mark it; 2. Those which are not marked as required by other sections than section 25; 3. Those where for any reason it is impossible to determine the voter's choice for an office to be filled, excluding the vote only as to such office; and 4. Those where the voter has marked more names than there are persons

to be elected to an office, excluding the vote only as to such office.

Whether we take the view that the counting of ballots with distinguishing marks is not prohibited, but rather required by the statute, or that these double marked ballots are not vicious as ballots marked to be distinguished, it follows that they must all be counted for Mr. Parker. We quote with approval the law as laid down in the syllabus in *People v. Board of Canvassers*, 156 N. Y. 36, 50 N. E. 425: "The presence of cross-marks before the name of the same candidate for the same office in two different columns is to be regarded as surplusage merely, and does not render the ballot invalid as a ballot marked for identification": See, also, *Attorney General v. Glaser*, 102 Mich. 406, 61 N. W. 648; *Sawin v. Pease*, 6 Wyo. 92, 42 Pac. 750.

It is not contended by the defendant that these double marked ballots, of which there are some one hundred and seventy-six, are in terms excluded from the count by the statute, but only that they must be excluded because such double marking constitutes a distinguishing mark, by which it may be inferred that the voter sought to distinguish his ballot for the purpose of being able to assure a purchaser of votes that he had "delivered the goods." It must be admitted that these marks ²²³ do not necessarily indicate a corrupt purpose. It is as reasonable, or more reasonable, to say that the voter so marked his ballot out of a superabundance of caution, or because he found Mr. Parker's name printed twice, and supposed, therefore, that he was to put down two crosses, as to say that his act must be explained upon the hypothesis of a corrupt motive. This is made doubly forceful when we remember the large number of ballots so marked, coming from all parts of the city. It is the duty of the court to ascertain the intent of the voter, and if it may fairly and reasonably deduce a motive consonant with honesty, rather than dishonesty, from his ballot, to count the same for the candidate of his choice, rather than to disfranchise him. A distinguishing mark, to warrant the rejection of the ballot, must be found to have been made for the purpose of identification.

These double marked ballots must all be counted for Mr. Parker. This leaves fifty-seven ballots claimed by Mr. Hughes and objected to by Mr. Parker, and about forty-one ballots claimed by Mr. Parker and objected to by Mr. Hughes, to be disposed of. No general rule other than that already laid down can be invoked to aid us in counting these. Quite a number are marked with ink or with pencil other than black, and these are all rejected. Some are marked with a single stroke, thus

☐ or thus ☑ or thus ☐ or thus ☐, instead of a cross; these also must be rejected. Some are marked with a cross after a name and also with a cross in the square after the blank space on the right of the ballot, without any name being written there; these are rejected as being distinguishing marks. Some are found with lines drawn diagonally across the face of the ticket not voted; others with perpendicular lines through these ²²⁴ names; others where names of candidates have been wholly or partially obliterated by pencil-marks drawn over them; others with names or initials written thereon—these are rejected as being made invalid by distinguishing marks.

As to the balance of these disputed ballots, they have all been carefully gone over, and have been rejected or counted, in each case as the court by an examination of the markings thereon came to the conclusion that there were reasonable grounds for believing that such mark was, or was not, made by the voter with the intent that his ballot should be thereby distinguished.

In the matter of the thirty-six ballots which came from the second precinct of the first ward, the plaintiff claims that the extra seven ballots should be excluded, under the rule laid down by McCrary, in his work on Elections, fourth edition, section 495—that is, by deducting the same from the vote of both parties in proportion to the vote for each in the precinct. The defendant claims that, inasmuch as it cannot now be determined which of these ballots were voted, the entire thirty-six ought to be excluded from the count; otherwise votes might be counted which were never voted. To sustain this claim, the rule in Paine on Elections, section 513, is cited. We are of the opinion that the rule invoked by the plaintiff is the proper one, so we consider all of these ballots. But upon looking into them we find there are but twenty-one which are entitled to be counted, the balance being faulty for various reasons. These twenty-one ballots we count for the candidates for whom they were cast in each case.

From the entire list of disputed ballots, we find that Mr. Parker is entitled to have counted for him one hundred and eighty-nine. ²²⁵ These, added to his undisputed ones, give him a total vote of six thousand three hundred and fourteen. Mr. Hughes is entitled to have counted for him, out of the disputed ballots, twelve, which gives him a total vote of six thousand two hundred and ninety-seven, giving Mr. Parker a majority of seventeen votes.

It follows, therefore, that the judgment of the court must be for the plaintiff.

Mr. Justice Cunningham, who wrote the above opinion, did so for the purpose of expressing the views of the majority of the court, from which both he and Justices Johnston and Green dissented, and he expressed his and their dissent in quite a lengthy dissenting opinion, in which, however, all concurred in the proposition that a statute making it criminal to mark a ballot, "so that it can be distinguished," necessarily implied that if so marked it cannot be counted.

Justice Cunningham then proceeded to state what he regarded as the difference between his own opinion and that of the majority of the court, as follows:

"As a basis of this argument, it will be assumed that ballots obnoxious to the provisions of section 27 ought not to be counted. At this point, however, Justices Smith and Ellis leave us. They prefer to adopt the uncertain rule of determining from the face of the ballot, aided by what the judges may happen to know outside, or by evidence aliunde, what are distinguishing marks, rather than by the safe and certain rule prescribed by the law. It is entirely competent for the legislature to throw around the exercise of the elective franchise such safeguards as, in its discretion and sound judgment, it shall deem best to insure a pure and secret ballot. It is the acknowledged primary object of the Australian ballot law to accomplish this end. Its accomplishment is more important than that all persons of the requisite age should be counted in the poll, the object being, as regards votes, quality first and quantity afterward. So the law may well say to the voter that if he wishes his vote to be counted he must record his choice of candidates in this prescribed manner; that his intention to vote must be ascertained in a given way. There is no hardship in this. If the citizen would vote, let him prepare himself to do so in the manner that the law prescribes. In this there is safety for his vote and our institutions as well. If the board of election judges, or the larger board of supreme court judges, who have counted the ballots in this case, assume to ascertain the intention of the voter from the face of the ballot, when that intention has not been expressed in the way pointed out by the statute, they may, perchance, deduce the wrong intention—may disfranchise the voter; but, however this may be, this court, following many others, has already decided that the provisions of the Australian ballot law are mandatory, and that ballots not marked in accordance with those provisions are not entitled to be counted: *Taylor v. Bleakley*, 55 Kan. 1, 49 Am. St. Rep. 233, 39 Pac. 1045. Hence, there only remains for us to inquire what those provisions are.

"As to the marks mentioned in section 25, we are all at one. The law says expressly that the ballot shall not be counted if marked as therein forbidden. As to the so-called distinguishing marks mentioned in section 27, the majority hold them to be as fatal, if they are distinguishing marks. But, to be distinguishing marks that shall be obnoxious to the law, Justices Smith and Ellis say that they

must not only be marks that distinguish, but that the judges by looking at them must in some unexplained and occult manner be able to deduce therefrom the intent of the voter thus to distinguish the ballots. This interpretation is faulty for two reasons: 1. It is not consonant with the language of the statute. The inhibition by the statute is against the counting of the ballot when 'any person shall . . . mark or fold his ballot so that it can be distinguished.' If the marking or folding is of such character that from it the ballot could be distinguished, then it may not be counted. The ban of the law is upon the ballot if it be marked or folded so that it can be distinguished. 2. With this interpretation the law is entirely without force and cannot be administered with certainty. One judge may look at a ballot on which are distinguishing marks and say that he does not think that the voter intended by this mark to distinguish the ballot, and another judge, looking at the same ballot, may come to a contrary conclusion. This case furnishes many examples of such variance.

"The voter's intention in this matter must be gathered from what he does. If the ballot be marked 'so that it can be distinguished,' then the mark is a distinguishing mark. If the voter does not know how to mark his ballot, sworn assistants are provided. If he spoil his ballot, another can be obtained. How small a percentage of voters there are who do not know how to vote under this system is shown by the fact that in the election now being considered only about two per cent of the votes cast are involved in this controversy. This two per cent of the voters would better be disfranchised than that the ballot law be despoiled of its safeguards. Our brethren have brought the principle for which they stand—that of arriving at the intention of the voter—from the old methods. Before the enactment of the reformed methods of voting, commonly called the Australian ballot laws, the intention of the voter thus determined was the solvent which was applied to all difficult questions, and unutterable confusion was the result. Under the new law the intention may be found only in the voter's act.

"In our opinion, these double marked ballots are so marked that they can be distinguished. That there are one hundred and seventy-six of them rather than one does not change their character. They should not be counted, because the law forbids the counting of ballots with distinguishing marks. That in this case there are so many does not matter. In some other election there might not be so many. It is a rule which is being established, and not a particular application. We think the authorities, so far as they go, hold with this contention. The case of Attorney General v. Glaser, 102 Mich. 406, 61 N. W. 648, cited above, was one in which the identical question at issue here was presented. The court in the original opinion (102 Mich. 396, 402, 64 N. W. 828), held in the fol-

lowing language: 'A large number of defective ballots had a cross under the party name of the Republican and also of the Citizens' ticket. The tickets were, it is true, identical; but a single mark constituted a vote, and the second mark was wholly unnecessary and inappropriate to register the voter's intent—as much so as would have been any mark placed under the Democratic ticket. Such mark might have been an agreed means for identification of the ballot, and must be held to have been a distinguishing mark. There were also a number of tickets in which the names of the candidates as they appeared on both tickets, both being identical, were marked. These are subject to the same considerations.'

"But afterward, on a rehearing of the case, it having been called to the attention of the court that the attorney general had on three different elections expressed a widely disseminated opinion construing the law otherwise, which opinion had quite generally been acted upon, the court, without in the least changing its former judgment, expressed itself, at page 409, as follows: 'We think, in view of this practical construction, it should be held that the class of ballots above referred to are not illegal.' So that on principle the Michigan supreme court stands committed to the proposition that such ballots should not be counted.

"The New York case (*People v. Board of Canvassers*, 156 N. Y. 36, 50 N. E. 425) was decided by a divided court. Even the opinion of the majority is based upon an analogy existing between the question in hand and the express provision contained in another part of the statute. So that, at its best, this case is of light weight as an authority here. The minority, however, two to three, express themselves in the following language, speaking of double marked ballots: 'It was an attempt to vote twice for the same candidate, and whatever may have been the intention of the voter, the second voting mark is prohibited by the statute, since it would be a convenient means of identification, and hence these ballots cannot be counted.'

"As bearing upon the particular question, and as indicating the strictness with which the various courts are applying the provisions of the Australian ballot law, and as suggestive of the wide departure this court is making by the judgment of the majority in this case from such general trend, the following quotation is made from a recent California case, *Farnham v. Boland*, 134 Cal. 151, 66 Pac. 200, at page 201: 'Under objection No. 1, we find a class of ballots counted by the trial court, where a cross is placed in a square, there being no candidate's name opposite the square. Such a cross is not in a legal place. The voter had no right, under the law, to place it there, and it is a distinguishing mark, which demands the rejection of that class of ballots. Under objection No. 2, a cross is found upon a class of ballots directly upon the line dividing the two squares. There is also a cross in each of the squares after the respective candidate's name. Thus, there is found a cross not authorized by the law, which may well serve as a means of identifying the ballot,

and ballots so marked should be rejected. Under objection No. 3, the court finds a class of ballots where two crosses are made after the candidate's name, one within the square and one without the square. There is no simpler way of evading the provision of the law than for a voter to mark his ballot in this manner. These crosses so placed are clearly identifying marks, and all ballots so appearing should be rejected. Under objection No. 4, the court finds a class of ballots with two crosses in the square. Upon some of these ballots the crosses are entirely separate, and upon others they are interlaced and joined in many different ways. The law says the voter shall stamp a cross after the name of the candidate; not two crosses, or three crosses, but a "cross." Two crosses in the square is no less a mark of identification than two crosses, one without and one within the square. An allowance of this practice would furnish a simple expedient by which the law could be violated. Two crosses in the square is not a legal mark upon the ballot. The law only contemplates one cross, and therefore ballots so marked should be rejected.'

"There can be no question but that the courts generally are strictly applying the provisions of the reformed election laws, and holding such provisions mandatory. What reason else for these laws? If the old rules of groping and agonizing for the intention of the voter, with little regard for the actual character of his ballot, were sufficient, why should the legislature seek to introduce others?

"As pointed out in *Taylor v. Bleakley*, 55 Kan. 1, 49 Am. St. Rep. 233, 39 Pac. 1045, the legislature of this state has authoritatively construed its own law by adopting without dissent the report of a committee containing the following: 'The great innovation upon the prior law made by the Australian law is that the intention of the voter shall be ascertained by an application to the ballot of the directions contained in the statute, and the provisions of our statute directing the manner in which the voter shall express his choice are mandatory. Another object of the law is to prevent the putting upon the ballot, by the voter or any other person, any mark save and except the cross in the proper space which will designate that ballot from any other ballot cast. Should the door be open to permit the counting of ballots containing any other than the marks permitted by the statute, it would enable persons who had bargained for votes to agree upon a distinguishing mark, whereby it could be determined, by a mere inspection of the ballot, whether or not the voter had carried out his part of the contract, thereby thwarting one of the main objects of the law.'

"The declaration on the part of the legislature of a rule of construction of its own enactment ought to be felt as of some binding force upon this court, even if its own approval of that rule, as found in *Taylor v. Bleakley*, 55 Kan. 1, 49 Am. St. Rep. 233, 39 Pac. 1045, is not.

"The difficulties with which the majority have struggled in the application of their 'intention of the voter' theory amply illustrate the untenable character of that theory. By way of illustration, we cite a few noticed as the count proceeded in this case. A cross-mark after the name of either Hughes or Parker, and also one in the square on the Independent ticket without a name, were thought to indicate a purpose to distinguish, while a cross after the name of Parker wherever it appeared on the ballot did not. A cross partially obliterated by scratching with a black lead pencil is held not to be a distinguishing mark, while one still further scratched, so that the cross is entirely obliterated, is found to indicate to the discerning mind a bad purpose. If the scratching still further proceeds, aided apparently by the sharp edge of a knife, so that a hole is left in the paper where the black spot had been, we are able to declare—by seeing through it—that the ballot was not thereby intended to be distinguished. A cross-mark to the left of a name partially erased distinguishes a ballot, but a like mark in one of the squares to the right of Parker's name does not. A single stroke in the square after Hughes' name makes a bad ballot, but a like stroke in one of the squares after Parker's name does not, providing a good cross is found in the other square. The 'intention of the voter' is found to be bad if he makes a cross outside of the printed square, the statute not specifically requiring it to be made in the square. A name or initials written on the ballot causes it to be rejected, unless by a comparison with other initials on the ballot, supposed to be those of an election judge, and by looking at the words 'sworn ballot' also written thereon, it shall be decided that probably the name was written there by the election judge. It is decided that the intention of the voter who deposited this ballot

For Mayor,
ALBERT PARKER



was all right; while the voter who de-

posited this one

For Mayor,
J. W. F. HUGHES

☒ intended it to be distinguished. The size of the mark evidently had somewhat to do with the application of the theory, because this ballot

For Mayor,
J. W. F. HUGHES

☒ was found to be without fault.

A correct intention on the part of the voter was occasionally so clearly discerned from the face of the ballot that a cross-mark specifically required by the statute was not found to be necessary to express it, as is evidenced by this ballot

For Mayor,
ALBERT PARKER

☒

and this

For Mayor,
J. W. F. HUGHES

☒ which were counted. However, it is not permitted that this departure shall go too far, for this ballot

For Mayor,
J. W. F. HUGHES.



was rejected. Again, perhaps the size of the mark had somewhat to do with the ability to determine the intention.

"Had the court in this case, after having admitted to the count all of the ballots doubled marked for Mr. Parker with two good crosses, then applied what seems to us to be the rational rule in the counting of the balance, the result would have been different. We think, however, that these double marked ballots were not only distinguished by such marking, so as to require their rejection, but that they also should have been rejected because they are expressly excluded from the count by the language of the statute. 'If the voter marks more names than there are persons to be elected to an office,' his ballot may not be counted. This language does not mean the same as if it read: 'If the voter marks the names of more persons than are to be elected to an office.' It reads 'more names.' Print the name of the same candidate as many times as you may choose on the ticket—that is advantage enough—but do not mark it but once. In not a few instances in this count did Mr. Parker gain a vote because a good cross-mark in one square helped out a poor one in the other.

"On the question of the thirty-six ballots returned from the second precinct of the first ward under cover marked, 'This package contains defective or objected to ballots not voted,' we are of the opinion that none of the ballots should have been counted, it not appearing which of them had been voted. We do not now know but that, at least, some portion of the ascertained majority for Mr. Parker, is made up of ballots never put into the ballot-box. It may be true that if the entire thirty-six ballots be thrown out, twenty-nine legal votes will be ignored, but it is also true that if all are considered a candidate may be elected to office by votes never put into the ballot-box and which represent no voter. In the case of *State v. Stevens*, 23 Kan. 456, where substantially the same question was presented, this court, at page 458, used this language: 'While legal and honest votes were cast, yet no court is under obligation to attempt to sift the grain of truth from the mass of falsehood.'

"Finally, we deem it our duty to call attention to the fact that but one single legal proposition is settled in this case. All of the justices, except the chief justice and Mr. Justice Pollock, hold that ballots which are obnoxious to the penalties denounced upon those who mark their ballots as indicated in section 27 should not be counted; and, further, that the apparent abandoning of the rule for determining the validity of a ballot as laid down by this court in *Taylor v. Bleakley*, 55 Kan. 1, 49 Am. St. Rep. 233, 39 Pac. 1045, is more apparent than real. The two justices last named repudiate the proposition that a ballot can be rejected at all on account of a distinguishing mark, while Justices Smith and Ellis only stand for

the rule that only such marks are distinguishing ones, requiring the rejection of the ballot, which the judge who is counting it shall conclude from all of the circumstances were intended to distinguish the ballot.

"Again, we say that in our opinion the statute requires the rejection of all ballots on which the voter has purposely made marks 'so that it can be distinguished,' and, as the application of this rule would result in a judgment for the defendant in this case, we dissent from the judgment rendered in favor of the plaintiff."

Justice Ellis also concurred with the views of the majority of the court in a separate opinion, in which he expressed his views as follows: "In the hope that I may be able to state somewhat more clearly than is done in the majority opinion the principles which it seems to me should control, and the rules of construction which I feel bound to follow in this case, I shall undertake to recite my views in relation thereto. In the dissenting opinion it is said: 'Our brethren have brought the principle for which they stand—that of arriving at the intention of the voter—from the old methods. So far as the statement relates to the writer it is partially true, and if the further charge had been made that we are inclined to hold that we could not abrogate that provision of our present statute which negatively, but by clear implication, requires the intention of the voter to be considered, the position of the two members of the court to which the above quotation applies would have been fully stated. The rule in existence before the adoption of the Australian ballot undoubtedly was that the intention of the voter, when ascertainable by an inspection of the ballot by the election board, or in case of an ambiguous ballot, aided by evidence aliunde in a contest before the courts, should govern. So general was the acceptance of that precept that the few exceptions only served to emphasize its salutary nature and the dominion accorded to it in the states of the Union.

"In *People v. Cicott*, 16 Mich. 283, 97 Am. Dec. 141, the learned judge and text-writer, Mr. Justice Cooley, said: 'All rules of law which are applied to the expression, in constitutional form, of the popular will should aim to give effect to the intention of the electors, and any arbitrary rule which is to have any other effect, without corresponding benefit, is a wrong, both to the parties who chance to be affected by it, and to the public at large. The first are deprived of their offices, and the second of their choice of public servants.'

"The doctrine received the cordial support of Judge McCrary, who, in his work on Elections (chapter 14, section 480) strongly indorses the opinion of Justice Cooley, from which the foregoing excerpt is taken, and Mr. Paine, in his work on Elections, unqualifiedly approves this interpretation of the law: Paine on Elections, sec. 538.

"In the case of *Clark v. Commissioners of Montgomery Co.*, 33 Kan. 202, 52 Am. Rep. 526, 6 Pac. 311, this court held: 'The inten-

tion of an elector is to be ascertained from the language of his ballot, read in the light of the circumstances of a public nature surrounding the election at which it is cast; and though his will is not expressed with precision, yet if it is fairly apparent, and can be determined beyond a reasonable doubt, it should be made effectual.'

"The important question now presented is whether the rule that where the intention of an elector could be thus ascertained it should be made effectual has been abrogated in this state. It certainly has not been by statute, for the last expression of the legislative will, subject to certain exceptions, continues this principle in force. Section 25 of chapter 129 of the Laws of 1897, so far as it relates to the subject under discussion, reads as follows: 'If the voter marks more names than there are persons to be elected to an office, or fails to mark the ballot as required by other sections of this act, or uses ink, or a pencil of any other color than black to mark his ballot, or if from any reason, it is impossible to determine the voter's choice for an office to be filled, his ballot shall not be counted for such office.'

"Note the language, 'if, from any reason, it is impossible to determine the voter's choice for an office to be filled, his ballot shall not be counted for such office'; e. g., if it be possible 'to determine the voter's choice for an office to be filled,' his ballot should be counted for such office, unless some other provision of the statute requires its rejection. It is submitted that its vitality has not been impaired by any decision of this court, although my brethren who dissent cite the case of *Taylor v. Bleakley*, 55 Kan. 1, 49 Am. St. Rep. 233, 39 Pac. 1045, as denying the continuance of the rule. The only proposition authoritatively determined in that case was that the cross-marks should be placed within the squares provided for that purpose, in accordance with a provision of the statute which the majority in this case have respected and treated as mandatory. It could not be abolished by the dictum of a legislative committee, whose report related not to a bill recommended for passage. That report was made in a contest case under an existing law, and it gave an opinion of such committee as to the construction which it thought should be given the provisions of such law.

"It seems to be claimed, however, that the will of the voter is no longer to be considered in those states which have adopted what is known as the Australian ballot law, although such laws, as enacted in the different states, are widely dissimilar in their provisions, and are still subjected to frequent amendments. With what talismanic power is the mere name 'Australian ballot law' invested that it may be held to work such a transformation?

"It may be profitable to investigate the question whether the salient guides so long and generally followed have been set aside by the adoption of those statutes. The only recognized author upon

the Australian ballot system, in the last edition of his work, said: 'Wherever our statutes do not expressly declare that particular informalities avoid the ballot, it would seem best to consider their requirements as directory only. The whole purpose of the ballot as an institution is to obtain a correct expression of intention; and if, in a given case, the intention is clear, it is an entire misconception of the purpose of the requirements to treat them as essentials—that is, as objects in themselves, and not merely as means': *Wigmore's Australian Ballot System*, 2d ed., 193.

"The same author, continuing, said: 'In the British, Belgian, Canadian and some of the Australian statutes an identifying mark is specially declared to avoid the ballot. This rule has been interpreted in two ways. By some courts it is held to be sufficient if the mark is one by which the voter might be identified. . . . This, of course, results in throwing out a very large proportion of ballots in which informal marks occur, though it is expressly said, as a part of the rule, that ordinary deviations due to awkwardness or carelessness are not to be regarded. . . . The rule has been stated as follows (more liberally than in the cases *supra*): "Whenever the court is convinced that the irregularity was the result of awkwardness, or a stiff, heavy or trembling hand, of carelessness, or an attempt to correct a supposed defect or to make a line more clear or more straight—whenever, in short, it appears that the addition to the required cross or the form of the cross or its embellishments are owing to an unskilled hand rather than to a desire to identify one's self—whenever the identification of the voter is rendered impossible by the impossibility of reproducing the same pencil-marks, the vote is good."'

"The same author, citing with approval the opinion of Mr. Justice Allyn, in *Dionne v. Gagnon*, 9 Queb. L. R. 20, said: 'According to a second and sounder view, the ballot must itself furnish clear evidence of an improper agreement, such as the voter's initials, or a mark known to be his,' in order that it may be rejected: Page 194.

"A recent decision of the supreme court of Connecticut, one of the first states in the Union to adopt the Australian ballot, overruled the early case of *Talcott v. Philbrick*, 59 Conn. 472, 20 Atl. 436, and held as follows: 'Marks upon the face of ballots which appear or are shown to have been made accidentally and not for the purpose of indicating the voter, and changes for the existence of which a reasonable explanation consistent with honesty and good faith either appears upon the face of the ballot or is shown by proof, do not render the ballots void': *Coughlin v. McElroy*, 72 Conn. 99, 43 Atl. 854, 77 Am. St. Rep. 301. See, also, cases cited in note.

"In the case of *State v. Fawcett*, 17 Wash. 188, 49 Pac. 349, it was held: 'It is also undisputed that the elective franchise, though a constitutional privilege and right, must be exercised under such

reasonable legislative restrictions as will prevent intimidation, bribery, and fraud, and secure an honest, untrammelled and genuine expression of public sentiment. It is also true, however, that in the absence of constitutional inhibition, all statutes tending to limit the citizen in the exercise of the right of suffrage should be liberally construed in his favor. If his ballot is rejected, it must come within the letter of the prohibition; and when the statute specifically declares under what conditions ballots shall be rejected, courts should not enlarge those conditions, or make other or different conditions from those expressed in the statute grounds for rejecting the ballots. . . . The important thing is to determine the intention of the voter, and to give it effect.'

"In considering a case under the Australian ballot law, the supreme court of Missouri quoted with approval the following language from a decision of a sister jurisdiction: 'All statutes tending to limit the citizen in his exercise of this right [of suffrage] should be liberally construed in his favor': *Bowers v. Smith*, 111 Mo. 45, 33 Am. St. Rep. 491, 20 S. W. 101.

"The supreme court of California, in *Tebbe v. Smith*, 108 Cal. 101, 49 Am. St. Rep. 68, 41 Pac. 454, cited and applied the language just quoted to the marking of a ballot by a voter under the California statute. In a recent case in California it was held that the writing by a voter, on his ballot, of the party designation of a candidate, after the name, which he has also written in, does not constitute a distinguishing mark which invalidates the ballot: *Jennings v. Brown*, 114 Cal. 307, 46 Pac. 77. And it was so held because the court said: 'It is quite manifest in this case that the words were not intended as a distinguishing mark,' and for the reason that the law might be construed as permitting it.

"In *State v. Russell*, 34 Neb. 116, 121, 33 Am. St. Rep. 625, 51 N. W. 465, 467, it was determined: 'It is not every mark by means of which a ballot might subsequently be identified which is a violation of the statute. The mark prohibited by law is such a one, whether letters, figures, or characters, as shows an intention on the part of the voter to distinguish his particular ballot from others of its class, and not one that is common to and not distinguishable from others of a designated class.'

"The court in that case approved of the language hereinbefore quoted from page 193 of the treatise on the Australian ballot system by Mr. Wigmore.

"In *Bechtel v. Albin*, 134 Ind. 193, 33 N. E. 967, a requirement that the voter should 'indicate the candidates for whom he desires to vote by stamping the square immediately preceding their names,' was held to be mandatory. Still, a ticket wherein 'the stamp touched slightly the lower side of the square' was held to be 'in substantial compliance with the law, and as not containing distinguishing marks and mutilation.'

"The supreme court of Colorado, in the recent case of *Nicholls*

v. Barriek, 27 Colo. 432, 62 Pac. 202, 205, held: 'That a ballot should be admitted if the spirit and intention of the law are not violated, even though not literally in accordance with its provisions; and that unless the statute declares that a strict compliance with its requirements by the voters is essential to have their ballots counted, the courts will not undertake to disfranchise them, if, in the attempted exercise of their right, there is manifestly an effort to comply in good faith with the statutory requirements.'

"Authorities might be multiplied, but no useful purpose would be subserved thereby. On the other hand, it is true that the courts of last resort in many, and, perhaps, a majority, of the states having the so-called Australian ballot law have inclined to give a stricter and less liberal construction of its provisions. In so doing they have disregarded the more liberal rules of construction which obtain in Australia, whence many provisions of these laws are derived. In most cases, however, the rule of construction thus indorsed is authorized by the plain letter of the statute in the particular state adopting it, though it must be confessed that at least two, and perhaps more, of the states have applied with great vigor the rule excluding ballots on account of distinguishing marks thereon, although the lawmakers of such states failed to enact provisions authorizing such decisions. Nevertheless, what Jeremy Bentham styled 'judge-made law' is now gravely commended to us as a controlling factor in determining the questions here pending. Inasmuch as our statute does not, in terms, exclude ballots from the count because of distinguishing marks, the question here presented is not so much one of construction as whether we shall read into the statute words not placed there by the legislature.

"Returning now to the statute, and considering directly the matter of distinguishing marks thereunder, it may be remarked that in enacting section 25 the legislature assumed, if it did not intend, that some ballots with marks upon them other than those required by the statute should be counted, at least in part. It is there provided, in substance and effect, that if it is impossible to determine the voter's choice for a given office, his ballot for such office shall be rejected, but that it shall be counted for other offices as to which the voter's will is clear. Of course, if there were no mark upon the ballot made with reference to the office for which it is not to be counted, it plainly could not be counted for that office, and a legislative expression to that end would be wholly unnecessary. It is, therefore, certain that the provision was made upon the supposition that certain marks would be made upon the ballots for a given office from which it would not be possible to glean the voter's intention; still, the ballot is to be counted for other offices named therein, notwithstanding it bears the ineffective marks thus made, except in cases where the marks are of such nature as to exclude the ballot under other clauses of that section or other sections of the statute.

Again, it is provided in the same section that 'if the voter marks more names than there are persons to be elected to an office... his ballot shall not be counted for such office.' This clearly implies that although he may have marked more names than there are persons to be elected to an office, and thus made one or more marks not required by the statute, his ballot may still be counted for other offices. This conclusion is irresistible, because the only provision in the statute for excluding a ballot upon which a voter marks more names than there are persons to be elected to an office is the one providing that it 'shall not be counted for such office.'

"That all ballots having marks upon them which are unnecessary and which might possibly serve to distinguish them from others are not to be excluded from the count, logically follows from the fact that the law expressly provides that ballots marked in a particular manner shall be so excluded. The maxim, '*Expressio unius est exclusio alterius*,' is directly applicable and controlling in the construction of this statute, and if there were no other provision from which it could be fairly inferred that the legislature intended that ballots containing certain distinguishing marks should not be included in the enumeration, I would join Mr. Chief Justice Doster and Mr. Justice Pollock in holding that distinguishing marks, other than those designated or referred to in section 25, could not operate to exclude a ballot from the count. I am constrained to believe, however, that section 27 may not be ignored in determining what ballots are rendered ineffective because of distinguishing marks. It is there provided that 'any person who shall . . . mark or fold his ballot so that it can be distinguished, or allow his ballot to be seen by any person with an apparent intention of letting it be known how he is about to vote . . . or who shall place upon or induce any person to place upon his . . . ballot, any character or mark for the purpose of identifying said ballot,' shall be guilty of an offense for which a penalty is prescribed in said section. In view of the maxim, '*Crimen omnia ex se nata vitiat*,' I am unable to see how one who marks or folds his ballot so that it can be distinguished, with an apparent intention of letting it be known how he is about to vote, or who places upon his ballot a character or mark for the purpose of identifying it, in violation of the plain provisions of this statute, can be heard to complain at the refusal of election boards or courts to give effect to his unlawful exercise of the right of suffrage by counting his ballot; and it is quite certain that a candidate for whom the vote was intended can have no standing in a court to urge that he be awarded the fruits of an act tainted with crime, and committed in violation of a penal statute.

"Without restating my views as given in the majority opinion of the court, I only desire to avoid a misapprehension of them by specifying that it is not believed that an election board, whose duties are merely ministerial, has any authority to receive evidence

as to a voter's intention. In the dissenting opinion, attention is called to the difficulties to be encountered in an application of the 'intention of the voter theory.' While admitting that one who pursues that course is not exempt from embarrassment, it is submitted that patient and learned thought and research have not yet discovered a method of dealing with the subject which is less obnoxious to objection and criticism. The difficulties which must be encountered under any system find illustration in this case.

"Herein, all ballots not otherwise objectionable, having crosses within the prescribed squares, were counted. Some of these crosses were small, others were large; some were in the center, others at the sides, and still others in the corners of the squares. Authorities are agreed that if the cross made within the square sufficiently conforms to the statute the vote must be counted, although the form or location of such cross might possibly serve as a distinguishing mark. Such being the law, suppose, by prearrangement, the crosses upon a given ballot were all made in the lower left-hand corners of the squares, that fact would serve to distinguish the ballot, and still it would have to be counted by the judges of election, and in case of contest, by the courts, unless by evidence aliunde the vicious compact should appear. It would be easy to point out other methods of marking a ballot so as to distinguish it without destroying its effectiveness, in the absence of evidence. Can it then be assumed that the legislature, without an expression to that effect, intended that every mark upon a ballot which might serve to distinguish it from others should render such ballot impotent? If such a rule had been applied in this case, several ballots for Mr. Hughes would have been excluded which were in fact included in the count. One ballot was soiled as by a sleeve or dirty hand, probably the latter. Another had a short, irregular mark upon it, as if carelessly made by the voter while examining the ballot, by pushing or drawing the pencil. It was near the cross-mark opposite Mr. Hughes' name, and connected with it, though partly without the square. It clearly served to distinguish the ballot from all others; still it was counted by unanimous agreement. Many ballots which were properly marked for Mr. Parker in the Democratic or Citizens' column, or both, were rejected because opposite the blank for mayor on the so-called 'Independent ticket,' and in the square provided for that purpose a cross-mark was also placed. If the result had been affected, I would have dissented from the decision of the court in excluding them. The ballots were not disfigured or mutilated. They were neither in terms nor by fair implication denied enumeration under the provisions of section 25, and it cannot reasonably be deduced that the crosses so made were intended to serve as distinguishing marks, so as to place such ballots under the ban of section 27.

"The decision in the case of *Farnham v. Boland*, 134 Cal. 151, 66 Pac. 200, which holds adversely to the views above expressed, was

in fact rendered under a statute widely different from ours, and is not pertinent."

Election Ballots are not invalidated if the name of a candidate appears on two tickets, and a cross is placed in the square opposite his name on each ticket: See the monographic note to Taylor v. Bleakley, 49 Am. St. Rep. 246. See, in this connection, the recent cases of Perkins v. Bertrand, 192 Ill. 58, 85 Am. St. Rep. 315, 61 N. E. 405; State v. Sadler, 25 Nev. 131, 83 Am. St. Rep. 573, 58 Pac. 284, 63 Pac. 128; Coughlin v. McElroy, 72 Conn. 99, 77 Am. St. Rep. 301.

Irregularities Avoiding Elections are considered in the monographic note to Patton v. Watkins, 90 Am. St. Rep. 46-92.

McMULLEN v. WINFIELD BUILDING AND LOAN ASSOCIATION.

[64 Kan. 298, 67 Pac. 892.]

OFFICIAL BOND—When Retrospective.—A bond executed after the commencement of the year, reciting that the principal had been elected secretary of an association for the year beginning January 1st and ending December 31st, and declaring that if he should perform the duties of the office during such year, the bond should be void and of no effect, but otherwise should remain in force, is retrospective in its terms, and renders the sureties answerable for defalcations occurring within the year, but prior to the execution of the bond. (p. 239.)

OFFICIAL BOND—Burden of Proving Whether Defalcations Occurred Before or After the Execution of a Bond.—Money which comes into an officer's hands before the execution of a bond is presumed to have been still in his possession, and the burden is upon his sureties to prove that defalcations by him occurred before the bond was given. (p. 239.)

OFFICIAL BONDS—Burden of Proof Respecting the Date of a Misappropriation.—Where there are successive bonds, and money is traced to the principal and not accounted for, the burden is on him and his sureties to show what became of the money, and, failing to do this, the presumption is that the defalcation took place during the term covered by the bond. (p. 240.)

OFFICIAL BOND—Interest, Whether Recoverable in Excess of the Penalty.—Where there is a defalcation equal to or in excess of the amount of the principal of an official bond, the amount of the recovery on the bond may include interest on the sum misappropriated from the date of the misappropriation. (p. 240.)

A STATUTE OF LIMITATIONS in Actions to Recover Moneys Misappropriated by an Official does not begin to run until the defalcation is discovered, where it was concealed by the principal by making false entries in his books, and he was of good repute for honesty. (p. 241.)

SURETIES—Statute of Limitations in Actions Against.—Where, Because of Fraud of a Principal in the concealing and misappropriation of money, the statute of limitations does not run against him, it does not run against the sureties on his bond. (p. 242.)

SURETIES—Negligence in not Discovering Defalcations of the Principal.—Though the books of the secretary of an association are

open to the examination of its officers and members, and due diligence might have detected the dishonesty of the principal and prevented or reduced the amount of his defalcation, his sureties are not released, provided the association or its members did not act in bad faith toward the sureties, nor omit any effort to protect the funds of the association after receiving notice of the dishonesty and unfaithfulness of the secretary. (p. 243.)

J. Jay Buck and McDermott & Johnson, for the plaintiffs in error.

Herrick & Rogers and L. H. Webb, for the defendant in error.

200 JOHNSTON, J. J. F. McMullen acted as secretary of the Winfield Building and Loan Association from its organization, in January, 1881, until January, 1892, having been elected at the beginning of each year during that period. On January 13, 1885, he was elected for that year, and gave a bond in the sum of \$2,000, signed by J. C. McMullen as surety, which 300 was dated February 2, 1885, and approved four days later. He failed to account for all the moneys received by him, and on February 2, 1892, this action was brought against him and his surety upon the bond mentioned.

In the petition, it was alleged that during the period covered by the bond, J. F. McMullen, as secretary, collected \$2,190.91 more than he had accounted for or paid over to the treasurer of the association, and that this amount he had fraudulently converted to his own use. There was a further averment that by false entries made in the books of the association, and by false statements and reports, he had concealed his wrong and defaults, and that, therefore, the association had no knowledge of the same until January, 1892.

A trial was had upon an agreed statement of facts, and, among other things, it was stipulated that during the year 1885 he collected \$10,799.34, and that during the same time he paid to the treasurer only \$8,763.47, so that from January 1, 1885, until December 31, 1885, his receipts exceeded the amount of his payments to the treasurer \$2,035.87. From the facts agreed upon, the court found that J. F. McMullen was indebted to the association on January 1, 1886, in the sum of \$2,035.87, and that on February 6, 1886, he paid on this indebtedness \$197.46, leaving \$1,838.41 unpaid. For this latter sum, with interest from January 31, 1886, amounting to \$3,725.84, judgment was given against both the principal and the surety.

It will be observed that the court held the surety liable for all the funds received by the secretary during the year 1885, and

for which he had not accounted. It is contended that the bond is prospective only, and that it did not cover any defaults except those occurring ³⁰¹ after it had been executed and accepted. As has been seen, the election occurred after the first of the year; the bond was not executed until February 2d, and was not accepted until February 6th. A considerable amount of the funds involved here was received by the secretary between January 1st and the execution and acceptance of the bond. Does the bond cover the defaults of the entire year? It is true, as plaintiffs in error contend, that sureties are favorites of the law, and that their liability cannot be extended by implication nor enlarged beyond the fair scope of their agreements. At the same time, their obligation, like other written contracts, must be given a reasonable interpretation, and if the fair scope of its terms covers past derelictions it must be so enforced. It may be assumed that, in the absence of a provision to the contrary, a bond can only be regarded as prospective and to cover only future transactions, but if the language used is retrospective, and clearly shows an intent to include defaults occurring before the execution of the instrument, the sureties will be held liable. The condition of the bond is as follows:

"Whereas, said J. F. McMullen has been elected secretary of the Winfield Building and Loan Association, of the city of Winfield, state of Kansas, for the year beginning January 1, 1885, and ending December 31, 1885, and has accepted said office: Now, therefore, if the said J. F. McMullen shall faithfully perform the duties of his office as secretary of said association during said year, then this bond shall be void and of no effect; but, otherwise, shall remain in full force and effect."

It will be noticed that the bond definitely fixes the period of responsibility. The surety binds himself for the faithful performance of the duties of the secretary for the year beginning January 1, 1885, and ending ³⁰² December 31, 1885. The principal occupied the position of trust during that period, and it was competent for the surety to make himself responsible for the defaults of the entire year. It appears to have been an annual office, which McMullen held continuously for about eleven years, and he was elected at the first meeting of the association held in January each year. The fact that the election was after the first of the year and term is not controlling, but the real question is, What time was intended to be covered by the bond? and that must be determined from its terms. The language is plain, and manifestly the parties contemplated that the bond

should be retrospective in its operation, and should indemnify against defaults occurring from the first to the last of the year. When it appears that a bond is intended to be retrospective as well as prospective, such effect must be given to it: *Brown v. Wyandotte County*, 58 Kan. 672, 50 Pac. 888; *Myers v. Kiowa County*, 60 Kan. 189, 56 Pac. 11; *State v. Finn*, 98 Mo. 532, 14 Am. St. Rep. 654, 11 S. W. 994; *Abrams v. Pomeroy*, 13 Ill. 134.

The amount collected during the year and not paid over exceeded the amount named in the bond. There is some contention as to the money on hand at the beginning of 1885, and whether it was misappropriated after the liability of the surety began. Presumably, money which came into the secretary's hands and should have been there was still in his possession, and the burden is on the surety in cases like this to prove that the funds presumably in the hands of his principal had been embezzled and misappropriated before he became liable on the bond: *Bernhard v. City of Wyandotte*, 33 Kan. 465, 6 Pac. 617; *Weakley v. Cherry Township*, 62 Kan. 867, 63 Pac. 433; *Bruce* ³⁰² *v. United States*, 17 How. 437. In like manner, it will be presumed that moneys collected during the period of liability and not accounted for were misappropriated during that period. Where there are successive terms and bonds, there is considerable difficulty in fixing the time of misappropriation and the liability of sureties, but when money is traced to the hands of an officer or trustee, and is not accounted for, the burden of proof is upon the principal or surety upon the bond to show what became of the money. The officer has knowledge of the time of misapplication, and by reason of the relations existing between principal and surety the latter is deemed to have knowledge of the fact, while the information would not be accessible to the parties indemnified. In *Boyd v. Withers*, 20 Ky. Law Rep. 511, 46 S. W. 13, a case of successive bonds given by a guardian who had defaulted, and where the ward was unable to fix the date of the conversion, it was said: "The liability of a surety on a guardian's bond, so far as the ward is concerned, is identical with that of his principal, and after proof of the receipt by the guardian of the ward's money, and failure to account for it, the guardian has not faithfully discharged the duty imposed by his obligation until he has clearly shown how it has been disposed of. Neither can the surety in the bond be permitted to say, 'You cannot prove the date when my principal converted the money, and therefore you cannot recover on any of

the bonds.' In our opinion, the law requires appellee to show what became of the money of appellants which was received by the guardian while he was bound as surety on his bond; and, in the absence of proof showing clearly that at the date of the execution of the new bond the fund was intact in the hands of the guardian, he should be held liable for the balance shown by the proof to be due": ³⁰⁴ See, also, *Wood v. Friendship Lodge*, 20 Ky. Law Rep. 2002, 50 S. W. 836.

While there is a contention as to the application of payments by the secretary in 1886, and, therefore, as to whether the amount or misappropriation in 1885 was correctly found by the trial court, we think the facts in the record are sufficient to support the judgment. The agreed facts include voluminous accounts and reports, which it is not practical to set out, but an examination of them satisfies us that they made a *prima facie* case for the association.

The judgment rendered is an excess of the penalty of the bond by reason of the allowance of interest. It is contended that the utmost limit of the surety's liability is the penalty named in the bond, and it may be granted that that was the measure of liability when the liability arose. When the secretary converted and wrongfully withheld the moneys of the association, the condition of the bond was broken, and a liability arose against both principal and surety. Interest is recoverable against both of them from the time of the default, not as a part of the penalty, but for the detention of the money after the same became due. During the continuance of the default, interest was due from the secretary, just the same as in cases where money is not paid when the creditor becomes entitled to it, and the surety who bound himself against the defaults of the secretary and became liable for them when they occurred can claim no exemption from the rule. So, while it is true, as the plaintiffs in error contend, that the penalty of the bond is the limit of liability of the surety, the liability arose at the time of the default, and the failure to discharge that liability when it matured warranted an allowance of interest beyond the penalty: *Burchfield v.* ³⁰⁵ *Haffey*, 34 Kan. 42, 7 Pac. 548; 1 Sedgwick on Damages, sec. 303; 4 Am. & Eng. Ency. of Law, 2d ed., 701.

It is next contended that the action was barred by the statute of limitations. A default may be said to have occurred in the beginning of 1886, and the action was not brought until February, 1892—more than six years after the default. It was based on the written bond, and therefore falls within the

five year limitation. The question then arises, Was the action brought within five years after the cause of action accrued? It was alleged that the secretary artfully and fraudulently concealed his misappropriations by making false entries in the books and by failing to make entries in the books of moneys received by him, as well as by making false entries and statements in his written reports of the transactions of his office, and that the association had no knowledge of his wrongful and fraudulent acts until some time in January, 1892. Among the agreed facts, it is stated that the secretary's reputation for honesty and integrity during all the time that he was in charge of his office was good, and that the officers and members of the association had perfect confidence in his honesty and integrity. They believed that his statements and reports as to the money collected and paid out were true, and they had no knowledge that he had collected more than was reported until about the first day of January, 1892. Did this fraudulent concealment interfere with the operation of the statute of limitations? Did the cause of action accrue when the fraud was committed, or not until the fraudulent conduct and defaults were discovered? Courts of equity have been holding that, independent of a statutory provision, the defendant's fraud and concealment of a cause of action will postpone the running of the statute of limitations until ³⁰⁶ such time as the plaintiff discovers the fraud; and this upon the theory that the defendant, having by his own wrong and fraud prevented the plaintiff from bringing his action, cannot take advantage of his own wrong by setting up the statute as a defense. Some authorities confine this rule to proceedings in courts of equity, but hold that at law neither fraud, concealment nor other circumstance will affect the operation of the statute, unless it is expressly provided for by statute. The weight of authority in this country and in England applies the rule to actions at law as well as to suits in equity. In *Bailey v. Glover*, 21 Wall. 342, Mr. Justice Miller, in holding that concealed fraud was an implied exception to the statute of limitations, equally applicable to suits at law as well as in equity, said: "Statutes of limitations are intended to prevent frauds, to prevent parties from asserting rights after a lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing fraud in a manner that it concealed itself until

such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure": See, also, *Munson v. Hallowell*, 26 Tex. 475, 84 Am. Dec. 582; *Rosenthal v. Walker*, 111 U. S. 185, 4 Sup. Ct. Rep. 382; *Traer v. Clews*, 115 U. S. 528, 6 Sup. Ct. Rep. 155; *Lieberman v. Bank*, 40 Atl. 382; *Lieberman v. First Nat. Bank*, 2 Penne. (Del.) 416, 82 Am. St. Rep. 414, 45 Atl. 901; *Sparks v. Farmers' Bank*, 3 Del. Ch. 274; *Moore v. Waco Bldg. Assn.*, 19 Tex. Civ. App. 68, 45 S. W. 974; 19 Am. & Eng. Ency. of Law, 2d ed., 245.

³⁰⁷ *McMullen*, by reason of his position and duties, occupied a trust relation, and was in fact an agent of the association. His misconduct and default was a breach of the relation of trust and confidence, and the general rule is, that the statute of limitations does not begin to run until the breach of trust or default in the performance of duties occurs and is brought to the knowledge of the principal: *Perry v. Smith*, 31 Kan. 423, 2 Pac. 784; *Moore v. Waco Bldg. Assn.*, 19 Tex. Civ. App. 68, 45 S. W. 974. In *Lieberman v. First Nat. Bank*, 2 Penne. (Del.): 416, 82 Am. St. Rep. 414, 45 Atl. 901, which was a case brought upon the bond of a defaulting bank clerk, it was contended that while the rule as to concealed fraud was enforceable against the one who committed the fraud, it did not apply to innocent sureties, who had no knowledge of and did not participate in the fraud. The court, after reviewing many authorities holding that sureties stand in no better position than their principal, said: "It therefore seems to be established that, in cases on official bonds, concealed fraud on the part of the principal will deprive both principal and surety of the benefit of the statute of limitations; that the statute does not begin to run until the fraud is discovered. The reason seems to be that in such bonds the sureties guarantee the good conduct and faithfulness of the principal in the discharge of the duties of his office, and that in equity and good conscience they should not be exempt from liability for his misconduct and peculations when by fraudulent concealment he has prevented discovery until the time limited by the statute to bring action has expired. Any other construction would make the very frauds against which the sureties covenanted the means for relief from liability. The bond in such case, instead of securing the faithfulness of the officer, would tend to promote on his part skillfully and fraudulently concealed peculations,

and would be an inducement to fraud. If concealed fraud, which the principal undertakes not to ³⁰⁸ perpetrate, deprives such principal of the protection of the statute, is it not equally reasonable that the undertaking of the surety that such fraud should not be perpetrated should exclude the surety also? The principal undertakes not to commit fraud. The surety guarantees that he shall not commit fraud. There would seem to be no substantial reason why their respective liabilities for such fraud should be different."

So, here, the surety guaranteed the honesty and faithfulness of McMullen, and promised to make good his defaults, and there is no good reason why the surety should be relieved of liability for the dishonesty of the secretary when by reason of the same dishonesty the liability was covered up. We think the liability of the surety depends upon the liability of the principal. There is no distinction between their liabilities in cases of concealed fraud, and the statute does not begin to run in favor of either until the fraud is discovered.

On the part of the surety, there is a contention that the books of the association were open to the inspection of its officers and members; that they should have detected the fraud; and that if due diligence had been exercised, the dishonesty would have been detected and the defalcation prevented or reduced. While negligence frequently is a bar to relief, on the principle that one ought not to recover from a surety damages caused by himself, the fact is that the surety made an unconditional promise to make good the defaults of his principal. No positive duty to the surety was imposed upon the officers and members to keep so close a watch over the conduct of the secretary that no fraud could be committed nor defalcation occur. Of course, they could not act in bad faith toward the surety, and, relying upon his liability, omit any effort to protect the funds of the association, after receiving ³⁰⁹ notice of the dishonesty and unfaithfulness of the secretary. He was a trusted officer, charged with the management of their business, and as he bore a good reputation for honesty during most of his incumbency, they had a right to assume that he would faithfully perform his duties until they received notice to the contrary. They had no knowledge or notice of unfaithfulness until 1892, and the mere fact that they did not detect crookedness in his books and reports before that time is not an indication of bad faith toward the surety, and does not exonerate him: *Lieberman v. Bank* (Del. Ch.), 40 Atl. 382; *Lieberman*

v. First Nat. Bank, 2 Penne. (Del.) 416, 82 Am. St. Rep. 414, 45 Atl. 901; Moore v. Waco Bldg. Assn., 19 Tex. Civ. App. 68, 45 S. W. 974; Graves v. Lebanon Nat. Bank, 10 Bush, 28, 19 Am. Rep. 50; Wayne v. Commercial Nat. Bank, 52 Pa. St. 343; Tapely v. Martin, 116 Mass. 275; Amherst Bank v. Root, 2 Met. 540.

The judgment of the district court will be affirmed.

Cunningham, Greene and Ellis, JJ., concurring.

The Sureties on an Official Bond are not answerable for defaults occurring prior to its execution, unless made so by its terms: State v. Finn, 98 Mo. 532, 14 Am. St. Rep. 654, 11 S. W. 994. Ordinarily, the bond will have no retrospective operation: Custer County v. Tunley, 13 S. Dak. 7, 79 Am. St. Rep. 870, 82 N. W. 84; Independent School Dist. v. Hubbard, 110 Iowa, 58, 80 Am. St. Rep. 271, 81 N. W. 241.

The Statute of Limitations, in cases of fraud, does not begin to run until the discovery of the fraud: Smith v. Blachley, 183 Pa. St. 550, 68 Am. St. Rep. 887, 41 Atl. 619; Reid v. Matthews, 102 Ga. 189, 66 Am. St. Rep. 164, 29 S. E. 173; or until it should have been discovered by the exercise of proper diligence and inquiry: Chicago etc. Ry. Co. v. Titterington, 84 Tex. 218, 31 Am. St. Rep. 39, 19 S. W. 472.

SKINNER v. MOORE.

[64 Kan. 360, 67 Pac. 827.]

HOMESTEAD—Statute of Limitations—Payments Made by Husband.—If a husband and wife execute a mortgage on their homestead to secure the payment of a note made by him only, his payment of interest from time to time, though without her knowledge, prevents the running of the statute of limitations, and the mortgage may be foreclosed in a suit commenced more than five years after the note became due. (p. 245.)

APPELLATE PROCEDURE—Practice, Who may be Omitted from.—If in a suit to foreclose a mortgage certain persons are made defendants under a general allegation that they claim to own or hold some right, title, or interest in the real estate, but there is no judgment for or against them, the failure to make them parties to the proceeding in error is not a ground for dismissal. (p. 247.)

Frank M. Sheridan, for the plaintiff in error.

Sperry Baker, for the defendants in error.

360 SMITH, J. A promissory note executed by a husband alone was secured by a mortgage jointly executed by the husband and wife on real estate occupied by them as a homestead. Payments of interest were made from time to time by the

maker of the note (the husband) without the knowledge of the wife. This action was brought in the court below more than five years after the note became due, in which a personal judgment against the husband and a decree foreclosing the mortgage were prayed for. The statute of limitations had not run on the note against the maker by reason of interest payments made by him. A decree of foreclosure was denied for the reason that the right to the same was barred as against the homestead interest of the wife in the real estate.

³⁶¹ We think the district court erred. A recovery on the note was never barred by the statute of limitations. No one except the husband was obligated to pay the debt evidenced by the note. The mortgage was a conditional conveyance securing the payment of the note so long as it was a valid and existing demand against the maker. In the case of *Perry v. Horack*, 63 Kan. 88, 88 Am. St. Rep. 225, 64 Pac. 990, a mortgage on a homestead was executed by a husband and wife to secure a note given by both of them. Before the note matured the husband died intestate, and the widow with three infant children continued to occupy the homestead. The mother made payments on the debt out of money derived from the products of the mortgaged land. The minor children made no payments.

In an action to foreclose the mortgage, brought more than five years after the maturity of the note, it was held that the payments made by the widow kept the debt alive, and that the mortgage could be foreclosed against all the land mortgaged. The court said:

"If payment had been made by one not obligated to pay the debt, there would be more reason to say that such payment did not keep the mortgage alive; but here it was made, as we have seen, by one who owed the whole debt and who joined in a mortgage given to secure the whole debt. The children had not assumed any personal liability for the debt, and had nothing to do with the matter of payments, but they took the land burdened with the mortgage, and so long as the statute of limitations does not run against the debt secured by the mortgage, it would seem that the mortgage itself might be foreclosed and the property sold to pay the debt which the mortgage was given to secure: *Waterson v. Kirkwood*, 17 Kan. 9; *Schmucker v. Sibert*, 18 Kan. 104, 26 Am. Rep. 765.

"Payment by Mrs. Horack kept the debt alive, and ³⁶² if we should treat these payments as for herself alone, the mort-

gage would still be enforceable. If she alone had made the note, and the children had joined in a mortgage on their property to secure it, and the debt had been kept alive by payments of the maker, no one would contend that the mortgage would be barred as to the children, or that it would be affected by their failure to make payments or otherwise acknowledge the existence of the debt. The children occupy no better position here, and the life of the note and the mortgage no more depends upon their acts than in the case above supposed.

"Considering the interest of the parties in the homestead, their relations to the debt and to each other, we conclude that, the debt having been kept alive, the mortgage which it was given to secure is enforceable against the entire property included in it."

In *Jackson v. Longwell*, 63 Kan. 93, 64 Pac. 991, a note was executed jointly by the husband and wife, and the land of the latter mortgaged to secure its payment. The note became barred by limitation as to the wife, but was kept alive by the husband by payments of interest. From a decree foreclosing the mortgage against the wife's land error was prosecuted in this court, and the judgment affirmed. The court said: "The statute of limitations having run in favor of Mrs. Jackson, she was discharged from personal liability on the note, and, therefore, she sustained the same relation to the note as though she had never signed it, but this in no way affected her agreement that her property should be subjected to the payment of her husband's debt evidenced by the note, and the case remained the same as though he only had signed the note when it was made, and both had at that time given a mortgage to secure it."

In the present case the obligation to pay the note rested on its maker with the same force and effect at ²⁶³ the time the action was begun as it did when the note was executed and when the mortgage was given to secure the note, so long as it remained a valid and subsisting evidence of debt against the maker. The reason is much stronger for not releasing the mortgaged property involved here than in the two cases from which we have quoted.

Other parties were made defendants in the court below. The petition alleged that they "claim to own or hold some right, title or interest in and to the above-described real estate." They have not been made parties here. There is no judgment for or against them appearing in the record. They seem to have been dropped out of the case. The allegations of the petition were

insufficient to state a cause of action against them: *Short v. Nooner*, 16 Kan. 220. A failure to make them parties to this proceeding in error is not ground for dismissal.

The facts being agreed to, the judgment of the court below will be reversed, with directions to enter a decree foreclosing the mortgage.

Doster, C. J., and Johnston and Greene, JJ., concurring.

The Principal Case was followed in *Fuller v. McMahan*, 64 Kan. 441, 67 Pac. 828, where both husband and wife joined in a note and in the mortgage of their homestead to secure its payment, and he, before the bar of the statute became complete, made two acknowledgments in writing of his liability on the note, and promised to pay it. The result of this action on the part of the husband was by the appellate court declared to be the same as if he "had made payment on the note when he executed and delivered his written acknowledgment of indebtedness and promised to pay." In *Investment Securities Co. v. Manwarren*, 64 Kan. 636, 68 Pac. 68, the rule of the principal case was again applied, and the court said: "It being within the power of the husband to suspend the running of the statute of limitations as against himself upon his obligation to pay the debt by an acknowledgment of a subsisting liability, either by the making of payments thereon, or by an acknowledgment in writing of an existing liability, as by law provided for tolling the statute of limitations, and as the mortgage remained enforceable so long as his obligation to pay the debt remained enforceable in law, it follows, and must be held, in an action to recover the debt and to foreclose the mortgage, that the statute of limitations cannot be successfully interposed by either husband or wife to defeat the mortgage lien, so long as the right of action to recover the debt may be maintained against either." The case of *Bank v. Hardman*, 62 Kan. 242, 61 Pac. 1131, was expressly overruled.

The Part Payment relied upon to remove the bar of the statute of limitations must, in general, be made by the party to be charged or by his agent: *Cowhick v. Shingle*, 5 Wyo. 87, 63 Am. St. Rep. 17, 37 Pac. 689; *Moffitt v. Carr*, 48 Neb. 403; 58 Am. St. Rep. 696; 67 N. W. 150. A grantee of a mortgagor, who assumes and agrees to pay the mortgage, does not, by subsequent payments of principal and interest, toll the statute as against the original mortgagor: *Cottrell v. Shepherd*, 86 Wis. 649, 39 Am. St. Rep. 919, 57 N. W. 983. And a payment by one joint debtor does not stop the running of the statute as to the other: *Boynton v. Spafford*, 162 Ill. 113, 53 Am. St. Rep. 274, 44 N. E. 379; *Cowhick v. Shingle*, 5 Wyo. 87, 63 Am. St. Rep. 17, 37 Pac. 689. See, further, *Maddox v. Duncan*, 143 Mo. 613, 65 Am. St. Rep. 678, 45 S. W. 688; *Patterson v. Collier*, 113 Mich. 12, 67 Am. St. Rep. 440, 71 N. W. 327.

so long as its regulations are impartial and uniform; but it has no power to establish rules which, under pretense of regulating the presentation of evidence, go so far as altogether to preclude a party from exhibiting his rights. Except in those cases which fall within the familiar doctrine of estoppel at the common law, or other cases resting upon the like reasons, it would not, we apprehend, be in the power of the legislature to declare that a particular item of evidence should preclude a party from establishing his rights in opposition to it. In judicial investigations the law of the land requires an opportunity for a trial; and there can be no trial, if only one party is suffered to produce his proofs. The most formal conveyance may be a fraud or a forgery; public officers may connive with rogues to rob the citizen of his property; witnesses may testify or officers certify falsely, and records may be collusively manufactured for dishonest purposes; and that legislation which would preclude the fraud or wrong being shown, and deprive the party wronged of all remedy, has no justification in the principles of natural justice or of constitutional law."

In Arkansas, a statute was enacted which, according to a certain theory of construction, imposed upon railroad companies an absolute liability to pay for stock killed by their trains, and withdrew from the jury all considerations of negligence of the owner of the stock or due care on the part of the company. The court held that such theory of construction could not be applied, notwithstanding the language of the act lent some countenance to it. for the reason following: "It is not within the province of the legislature to divest rights by prescribing to the courts what should be conclusive evidence. . . . "The legislature may declare what shall be received as evidence, but it cannot make that conclusively true which may be ^{so} shown to be false; at all events, if such facts are necessary to show that the substantial rights of property are to be affected, and he is made to lose his property": *Little Rock etc. R. R. Co. v. Payne*, 33 Ark. 816, 34 Am. Rep. 55.

In Minnesota, a statute was enacted which made the fact that a person who performed labor or furnished material in the erection of a house on another's land conclusive evidence that the labor was performed or the material furnished with the owner's consent, unless the latter had, by suit in the courts, enjoined the act as a trespass. Of this act the court said: "A man cannot be thus deprived of his property without his consent. The legislature may doubtless establish rules of evidence; but to en-

act a law making evidence conclusive which is not so necessarily in and of itself, and thus preclude a party from showing the truth, would be nothing short of confiscation of property and a destruction of vested rights without due process of law": *Meyer v. Berlandi*, 39 Minn. 438, 12 Am. St. Rep. 663, 40 N. W. 513.

An act of Congress in 1862, in relation to enlistments in the military service of the United States, provided that "the oath of enlistment taken by the recruit shall be conclusive as to the age." In an action of habeas corpus brought by the parent or guardian of a minor recruit, it was held that the statute was not binding on the petitioner as establishing a conclusive presumption of age, for the reason that the declaration as to age was a "judicial act," a matter for judicial inquiry, from entering on which the courts could not be precluded: *Wantlan v. White*, 19 Ind. 470.

The legislature of Minnesota enacted a statute providing that the schedule of rates for the transportation of property over the railroads of that state, made and published by the board of railroad and warehouse ⁸⁰⁷ commissioners, should be final and conclusive as to what were equal and reasonable charges. The supreme court of the United States held the act void: *Chicago etc. Ry. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. Rep. 702.

A statute of this state assuming to authorize counties to pay bounties for the killing of gophers was held unconstitutional, for the reason that the subject had not been expressed in its title. Later, a statute was enacted, probably intended to be curative of the authority exercised under the former one, but which was so worded as to validate the mere ministerial act of issuing the warrants in payment of the bounty only, and not the original authority to issue them. The warrants so issued were declared "hereby legalized, and hereby made county charges and payable out of the general fund of the county. This so-called curative act was held to be in the nature of a legislative judgment against the county in favor of the holders of the warrants, an endeavor to preclude investigation into the rightfulness of their issuance, and, therefore, a usurpation of the judicial function to try and determine causes, and consequently void: *Felix v. Wallace County*, 62 Kan. 832, 84 Am. St. Rep. 424, 62 Pac. 667.

The theory on which all these cases proceed is that an act of the legislature which undertakes to make a particular fact or matter in evidence involving the substantive right of the case conclusive upon the parties, and which precludes inquiry into the meritorious issues of the controversy, is an invasion of the judicial province and a denial of due process of law. The legisla-

ture may regulate the form and the manner of use of the instruments of evidence—the media of proof—but it cannot preclude a party wholly from making his proof. A statute which declares what ^{soe} shall be taken as conclusive evidence of a fact is one which, of course, precludes investigation into the fact, and itself determines the matter in advance of all judicial inquiry. If such statutes can be upheld, there is then little use for courts, and small room indeed for the exercise of their functions.

It will be observed that the statute in question by its terms shuts out all proof as to the occurrence of fraud or mistake in the making of the bill of lading. Admitting, however, that of necessity there must be read into the act an exception against fraud, why should there not be an exception in favor of mistake as well, for if the bill of lading was executed by the mutual mistake of both parties, it does not evidence the contract of either one? In order to constitute a contract, the minds of the parties thereto must have met. If by reason of mutual mistake no such concurrence has been had, it follows that no contract has been entered into, notwithstanding the fact that written evidence of one may have been executed. Therefore, to give effect to the act in question, we must say that the legislature has the power to force contracts upon parties by making indisputable that which in reality is only evidence of their contract. It is hard to see where this would end were its entrance admitted. Of course, the contracts of parties are binding on them. It does not require an act of the legislature to make them so. It is the function of the court and not of the legislature to determine when contracts exist and what they are. To shut out proof that what purports to be a contract is not really such, by reason of mutual mistake of the parties thereto, is in effect to require the performance of an act which was never agreed on between them; or, in other words, it is to ^{soe} allow the legislature to make for parties a contract which they never made for themselves.

It is claimed that this sort of legislation is defensible and proper under the law of estoppel, and that, where the parties have entered into the seeming contract, they may be prohibited by the terms of their act from denying its effect as written. The trouble, however, lies in the application of the rule of estoppel and in the assumption that the bill of lading speaks the contract of the parties. Whether it does is the very question at issue, the very question on which the plaintiff in error sought to offer evidence. If the writing was not the expression of the contract

of the parties to it by reason of mutual mistake or fraud, then how could either be estopped by it? Estoppel is only predicated of contracts which parties have really made. We do not intend to rule that there are no classes of acts or contracts that may not be made conclusive upon the parties thereto by the legislature, but we do intend to hold that it is incompetent for the legislature to make that conclusive of the fact and character of a contract which does not in reality express a contract because of fraud or mistake that may inhere therein.

There was error, also, for another reason—in rejecting the deposition. The evidence offered was to the effect that the cars in which the hay was shipped were sealed at the loading point, and that the seals were found unbroken at the point of destination. Had this evidence been admitted, it would have tended to prove that whatever hay the company received it safely transported, and, inasmuch as the plaintiff claimed that the company received the amount receipted for in the bills of lading, the evidence tended to prove that the same amount was transported and ~~and~~ delivered. For this reason the deposition should have been admitted, and, therefore, its rejection was error.

The claim is made that the statute heretofore discussed is in violation of the interstate commerce clause of the federal constitution. This claim is untenable. It does not regulate rates, levy taxes or impose restrictions of any kind on commerce between the states. It is a police regulation designed to promote accuracy in dealings between shippers and carriers, by compelling the latter to furnish facilities for ascertaining the weight of products offered for shipment.

A statute in Texas imposed a penalty on railroad companies for refusing to deliver freight on demand of the consignee and tender of the charges. It was contended that, as to shipments originating in other states, the act was a regulation of interstate commerce, and could not have effect. The contention was overruled: *Gulf etc. Ry. Co. v. Dwyer*, 75 Tex. 572, 16 Am. St. Rep. 926, 12 S. W. 1001.

A statute of Iowa required railroad companies to post their schedules of transportation rates in their station-houses, and affixed penalties to the nonperformance of the duty. The act, although applying to interstate as well as local rates, was held not to be a regulation of interstate commerce: *Railroad Co. v. Fuller*, 17 Wall. 560. The principle on which these cases rest, that such enactments were police regulations, likewise underlies the statute in question.

The statute allows an attorney's fee for the successful prosecution of a case under its provisions. The reason for this is the negligence of the carrier in failing safely to transport and deliver the goods committed to its charge. The case in that respect comes fully within the principle of *Atchison etc. R. R. Co. v. Matthews*, ⁸¹¹ 58 Kan. 447, 49 Pac. 602, affirmed by the supreme court of the United States in 174 U. S. 96, 19 Sup. Ct. Rep. 609. See, also, *British American Assur. Co. v. Bradford*, 60 Kan. 82, 55 Pac. 335.

For error in rejecting the deposition for the reasons above given, the judgment of the court below is reversed and a new trial is ordered.

Johnston, Cunningham, Greene, and Pollock, JJ., concurring.

Smith and Ellis, JJ., dissenting from the first paragraph of the syllabus and corresponding portion of the opinion.

Chief Justice Doster Dissented from the proposition that the legislature may not give to the receipt in a bill of lading issued by a common carrier a conclusive effect as evidence of the weight of the thing receipted for; and Justices Smith and Ellis joined in the dissent. He maintained that the cases upon which the majority relied related either to statutes declaring a conclusive presumption of negligence from the killing of livestock, a conclusive presumption of assent to a trespass from a failure to apply to the courts to enjoin it, and a conclusive presumption that railway rates, officially published, were reasonable; and he was of the opinion that these cases did not tend to support the judgment of reversal. He also declared that the cases of *Felix v. Wallace County*, 62 Kan. 632, 84 Am. St. Rep. 424, 62 Pac. 667, and *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. Rep. 281, while more nearly supporting the views of the majority, were still not in point, and he relied, as supporting his views, upon *Daggs v. Orient Ins. Co.*, 136 Mo. 382, 58 Am. St. Rep. 638, 38 S. W. 85.

The Legislature Cannot, it has been held, prescribe a rule of conclusive evidence: *Little Rock etc. Ry. Co. v. Payne*, 33 Ark. 816, 34 Am. Rep. 55. Compare the note to *People v. Cannon*, 36 Am. St. Rep. 686-689; and see *Larson v. Dickey*, 39 Neb. 463, 42 Am. St. Rep. 595, 58 N. W. 167. A statute is in excess of the power of the legislature which makes conclusive the action of the state weighmaster in weighing grain at terminal elevators: *Vega Steamship Co. v. Consolidated Elev. Co.*, 75 Minn. 308, 74 Am. St. Rep. 484, 77 N. W. 973.

The Constitutionality of Statutes allowing attorneys' fees is considered in *Matter of Chapman v. New York*, 168 N. Y. 80, 85 Am. St. Rep. 661, 61 N. E. 108; monographic note to *Dell v. Marvin*, 79 Am. St. Rep. 178-186.

IN RE NORTON.

[64 Kan. 842, 68 Pac. 639.]

COURT DE FACTO—When Cannot Exist.—Though an election is authorized to be held to determine whether a court shall exist, and after such election returns are canvassed, the proper officers certify that the proposition has carried, and a judge and other necessary officers are appointed and assume to exercise the duties of their offices, yet if it is afterward established that the result of such election was not in favor of creating such court, it cannot be treated as a court de facto. (p. 257.)

COURTS AND OFFICERS De Facto.—There cannot be a court or officer de facto where there can be no court or officer de jure. (p. 257.)

PUBLIC OFFICERS—Color of Office.—An appointment or election of one to an office that has no legal existence gives no color of existence to the office or color of authority to the person so appointed or elected. (p. 258.)

HABEAS CORPUS—Inquiry into Upon the Authority of a Court.—On habeas corpus it may be shown that the court under whose judgment or order the prisoner is deprived of his liberty had no legal existence or is not a court of competent jurisdiction. (p. 259.)

JURISDICTION.—A Court is not of Competent Jurisdiction unless it is provided for in the constitution or created by the legislature, and has jurisdiction of the subject matter and of the person. (p. 260.)

Blue & Glasse, for the petitioner.

A. A. Godard, attorney general, and J. N. Dunbar, county attorney, for the respondent.

842 GREENE, J. This is an original proceeding in habeas corpus. On the thirtieth day of June, 1900, the petitioner, John D. Norton, was convicted in the court of common pleas of Cherokee and Crawford counties of murder in the second degree, and sentenced to imprisonment at hard labor in the state penitentiary for a term of twenty years. Norton presents his petition for a writ of habeas corpus, alleging ⁸⁴³ that said court had no legal existence at the time he was convicted and sentenced, and, therefore, that his imprisonment is illegal and he ought of right to be discharged therefrom.

The court of common pleas of Cherokee and Crawford counties was created by chapter 16 of the Laws of 1898, passed at the special session. Section 1 provides: "That a new court of record be, and such court is hereby created and established for the counties of Cherokee and Crawford, to be called the court of

tion; or 2. Upon any process issued on any final judgment of a court of competent jurisdiction."

It will be observed that this limitation does not preclude the court from inquiring into the validity of the process, or determining whether the court whose judgment is in question was a court of competent jurisdiction.

It was held in *In re Rolfs*, 30 Kan. 758, 1 Pac. 523, and *Franklin v. Westfall*, 27 Kan. 614, that on a return of a writ of habeas corpus the court could investigate the jurisdiction of the court under whose commitment the petitioner was held. To the same effect are the decisions in *State v. Billings*, 55 Minn. 467, 43 Am. St. Rep. 525, 57 N. W. 206, 794, *Ex parte Page*, 49 Mo. 291, and in *People v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211.

Was the court of common pleas of Cherokee and Crawford counties a court of competent jurisdiction? We suppose it will be conceded that a court of competent jurisdiction is one provided for in the constitution or created by the legislature, and having jurisdiction of the subject matter and of the person. In *People v. Liscomb*, 3 Hun, 769, it was said that a "competent tribunal" meant a "tribunal having jurisdiction of the subject matter and the person"; in *Babbitt v. Doe*, 4 Ind. 359, it is said that the term "competent jurisdiction, in its usual signification, embraces the person as well as the cause"; and in the notes to *People v. McLeod*, 3 Hill, 665, it was said that "if there was no legal power to render the judgment or decree or issue the process, there was no competent court, and, consequently, no judgment or process."

The court that tried the petitioner had no legal existence; it was not, therefore, a court of competent ⁸⁵⁰ jurisdiction, or, in fact, of any jurisdiction, and had no power to try or sentence him.

The process under which he is now incarcerated is illegal and void, and he is discharged from the commitment under which he is now being held, and the warden of the state penitentiary is instructed to deliver him to the sheriff of Cherokee county, provided he makes demand on or before the first day of May, 1902.

All the justices concurring.

On *Habeas Corpus*, after conviction and judgment, the title of the judge or justice to his office cannot be determined. It seems, however, that the prisoner may be released in such proceedings if the office has no legal existence: See the monographic note to *Koepeke v. Hill*, 87 Am. St. Rep. 177, 178.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

GLEASON v. SMITH.
[180 Mass. 6, 61 N. E. 220.]

NEGLIGENCE—Child, When Guilty of Contributory.—A boy twelve years of age, of capacity and experience usual to boys of his years, is guilty of contributory negligence, if, while engaged in the street in a game with other boys, he dodges rapidly into a collision with a slowly approaching team, when chasing another boy, and without taking any measures to ascertain the approach of vehicles or to otherwise avoid danger. (p. 262.)

Action of tort brought on behalf of an infant by his father to recover for injuries sustained by coming in contact with defendant's horse and wagon, alleged to have been driven negligently by defendant's employé. The trial court directed a verdict for the defendant, and the plaintiff alleged exceptions.

T. B. O'Donnell and M. J. Griffin, for the plaintiff.

W. Hamilton and W. H. Brooks, for the defendant.

* **BARKER, J.** The defendant's team was traveling slowly, for a lawful purpose and in a manner which, according to the plain weight of the evidence, was in no respect negligent. But as one witness testified that the servant who, according to the testimony of the other witnesses, was driving, was not in fact driving, and was in fact looking into the delivery basket which was in the rear end of the wagon, we assume in favor of the plaintiff, that there was some evidence of negligence on the part of the defendant's servant.

The plaintiff was about twelve years old, and there is no contention that he was not equal in capacity and experience to the

usual boy of that age. With several other boys of a similar age, he was using the street as a place in which they were playing a game which required them to run from one sidewalk to the other, and in which the plaintiff was trying to catch some other boy as the others, upon the plaintiff's call, ran from side to side of the street. The game had been in progress for fifteen minutes or more, and the plaintiff had been engaged in it for several minutes. His part required him to stand between the sidewalks, give the call at which the other boys were to run across, and to attempt to catch some one of them as they did so. It was to be expected that the boys would run fast and would dodge, and in attempting to catch a boy who was so doing the plaintiff came in contact with the team and was hurt. The occurrence was about dusk. There was an electric light in the neighborhood, and the team, if going faster than a walk, was going slowly. It is plain from the uncontradicted testimony that neither the plaintiff nor any of the other boys engaged with him in the play took any care or precaution to avoid collision with vehicles using the street for purposes of travel. They were all using the street as they might use a playground set apart for such sport. While the plaintiff was bound to exercise only such care as ordinary boys of his age and intelligence are accustomed to exercise under like circumstances, yet the standard is the conduct of boys who are ordinarily careful: *Hayes v. Norcross*, 162 Mass. 546, 548, 39 N. E. 282. To dodge rapidly into collision with a slowly approaching team, while chasing another boy in order to catch him while he crossed the street, without taking any measures to ascertain the approach of vehicles or to avoid danger, was conduct which the judgment of common men would universally condemn as careless in a boy of the plaintiff's age.

In this view of the case, it is unnecessary to express any opinion upon the exception relating to the ordinance prohibiting the playing of any game in the street.

Exceptions overruled.

The Case of Aiken v. Holyoke St. Ry. Co., 180 Mass. 8, 61 N. E. 557, is somewhat similar to the principal case, the main difference between them being that in the *Aiken* case there was evidence to prove that the plaintiff, when injured, was not engaged in play, but was merely running home after his play was completed. A street-car turned into the street, running at the rate of from two to five miles an hour, and there was evidence to the effect that the gong did not sound, and otherwise sufficient to warrant the jury in finding that the driver of the car was guilty of negligence. The boy and the

car collided, and it was claimed that he was guilty of contributory negligence, because he was running at the time and did not see the car. He was only six years of age. The appellate court said: "Considering the tender age of the plaintiff, if he was not engaged in play, he could not be said, as matter of law, to have been guilty of negligence in running across the street on his way home. It could be found from the evidence that when he ran from the lawn, the car had not yet entered the street, and it does not appear that there was any other vehicle in the street with which there was any danger of his coming into collision. It cannot be held, as matter of law, that for a child of six or seven years to run across a street on his way home from school is, of itself, negligence. He himself testified that his attention was attracted by the whistle of steam cars which were crossing the same street at a more distant point, and neither the fact that he was running, nor that he did not see the electric car, precluded a finding that he was in the exercise of such care as might be expected from an ordinarily prudent child of his years."

A Child may be Chargeable with Contributory Negligence: Hermanns v. Kinnare, 190 Ill. 156, 83 Am. St. Rep. 123, 60 N. E. 215; Holdridge v. Mendenhall, 108 Wis. 1, 81 Am. St. Rep. 871, 83 N. W. 1109; Roanoke v. Shull, 97 Va. 419, 75 Am. St. Rep. 791, 34 S. E. 34. But in the application of the doctrine of contributory negligence to children, the rule governing adults is greatly modified. A child is held to exercise such a degree of care and discretion only as is reasonably to be expected from children of his age: Tully v. Philadelphia etc. R. R. Co., 2 Penne. (Del.) 537, 82 Am. St. Rep. 425, 47 Atl. 1019; Queen v. Dayton Coal etc. Co., 95 Tenn. 458, 49 Am. St. Rep. 935, 82 S. W. 460; Foley v. California Horseshoe Co., 115 Cal. 184, 56 Am. St. Rep. 87, 47 Pac. 42; Price v. Atchison Water Co., 58 Kan. 551, 62 Am. St. Rep. 625, 50 Pac. 450; monographic note to Barnes v. Shreveport City R. R. Co., 49 Am. St. Rep. 408-413. He may be of such tender years as to be incapable of contributory fault: Evers v. Philadelphia Traction Co., 176 Pa. St. 376, 53 Am. St. Rep. 674, 35 Atl. 140; Highland etc. R. R. Co. v. Robbins, 124 Ala. 118, 83 Am. St. Rep. 153, 27 South. 422.

WALSH v. LOOREM.

[180 Mass. 13, 61 N. E. 222.]

NEGLIGENCE in the Care of Children—What is Not.—Where a mother leaves her child, less than eighteen months of age, playing with other children in a neighbor's yard, between which and the street there is no fence or other obstruction, the street being a quiet one, it cannot be held, as a matter of law, that the child might dart out into the street before the mother saw it, or might fail to notice it, though it went out so slowly that she was guilty of such negligence that the case should be taken from the jury, in an action to recover for damages sustained by it from being overrun in such street by defendant's wagon. (p. 264.)

W. R. Heady, for the defendant.

W. H. McClintock, J. B. Carroll and D. A. Coyne, for the plaintiff.

¹⁸ HOLMES, C. J. This is an action under the Statutes of 1898, chapter 565, for causing the death of the plaintiff's intestate, an infant aged seventeen months and twenty-seven days, by running over him with a wagon in the highway. The plaintiff has had a verdict, and the case is here on the defendant's exception to a refusal to take the case from the jury, on the ground that the mother of the child left it unattended so far as to amount to a want of due care.

The mother had been going to and fro between her house and that of Mrs. Griffin, which was the next house but one to hers. She had left the child with or near some other children in the back part of Mrs. Griffin's yard, telling it to go back and play with them, and had returned with Mrs. Griffin to her own yard, where she was working in a flower-bed when the accident happened. Mrs. Griffin went back again to her own house and saw the child at or near her flower-bed at the side of the house. She went downstairs for some potatoes, and when she came up the child had been run over. The estimates of time are all somewhat vague, but it would seem that the mother must have left the child from ten to twenty minutes at least, but that the time between Mrs. Griffin's last sight of it and the accident was inside of five minutes. Mrs. Griffin's yard had no fence between it and ¹⁹ the street, but the mother, from where she was, could see the street in front beyond the Griffin lot. The accident happened on the further side of the street from where the child was left, nearly in front of where its mother was at work. There was evidence that the street was a quiet street.

The length of time that the child was in the Griffin lot in safety does not seem to be very material in this case. There were children near it with whom it had been told to play, and Mrs. Griffin's return may be said to mark a new starting point from which to consider the mother's conduct. The child then was under a competent eye, as the mother knew that it would be. The question, then, is whether leaving the child where it might dart out into a quiet street before the mother saw it, or failing to notice it if it went out more slowly, were so clearly negligent that the case should have been taken from the jury. It seems to us that that is more than we ought to say. As the jury were of opinion that such oversight as the mother could use,

and may be presumed to have used, were as much as fairly could be expected or required from one in her situation we cannot say that they were wrong: *McNeil v. Boston Ice Co.*, 173 Mass. 570, 576, 577, 54 N. E. 257; *Butler v. New York etc. R. R. Co.*, 177 Mass. 191, 193, 58 N. E. 592. In *Grant v. Fitchburg*, 160 Mass. 16, 39 Am. St. Rep. 449, 35 N. E. 84, it was undisputed that the child had been in the street or close to it for fifteen minutes. Here the jury may have found that the child had just got into the street from Mrs. Griffin's lot.

Exceptions overruled.

The Negligence of a Parent as affecting his right to recover for injuries to his child is considered in *Cotter v. Lynn etc. R. R. Co.*, 180 Mass. 145, 61 N. E. 818, post, p. 267, and cases cited in the cross-reference note thereto. For circumstances under which a parent is not, as a matter of law, barred of his right to recover for injuries sustained by his child whom he has permitted to wander into the public streets, see *Rosenkrantz v. Lindell Ry. Co.*, 108 Mo. 9, 32 Am. St. Rep. 588, 18 S. W. 890; *Marsland v. Murray*, 148 Mass. 91, 18 Am. St. Rep. 520, 18 N. E. 680.

GILLIS v. GOODWIN.

[180 Mass. 140, 61 N. E. 818.]

A MINOR May Disaffirm and Avoid a Contract by him made for the purchase of a bicycle of which he has had possession and use, and recover a sum which he paid on account of such purchase without putting the other party in statu quo or allowing anything for the rent and use of the property while in his possession under the contract of purchase, though the reasonable value of the use of the bicycle was equal to the sum paid by him on account of its purchase. (p. 266.)

R. P. Coughlin, for the defendant.

W. J. Davison, for the plaintiff.

140 MORTON, J. This is an action by a minor, by his next friend, to recover certain sums paid by him under a contract for the conditional sale and purchase of a bicycle. The plaintiff failed to perform the contract and the defendant took possession of the bicycle, as he had a right to do under the contract, and now has it. The plaintiff demanded the amount which he had paid, and the defendant refused to pay over the same. There was evidence that the amount paid by the plaintiff would

not be an unreasonable sum for the rent and use of the bicycle during the time that the plaintiff had the possession and use of it. The defendant asked the judge to rule that the plaintiff could not avoid his contract, and further asked the judge to find for the defendant. The judge refused both requests, and found for the plaintiff, and the case is here on the defendant's exceptions.

Whatever may be the law elsewhere (see *Rice v. Butler*, 160 N. Y. 578, 73 Am. St. Rep. 703, 55 N. E. 275), it is settled in this state that a minor can avoid a contract like that in this case, and is not obliged to put the other party in statu quo or allow anything for the rent and use of the property while in his possession: *Morse v. Ely*, 154 Mass. 458, 26 Am. St. Rep. 263, 28 N. E. 577; *Pyne v. Wood*, 145 Mass. 558, 14 N. E. 775; *McCarthy v. Henderson*, 138 Mass. 310; *Dube v. Beaudry*, 150 Mass. 448, 15 Am. St. Rep. 228, 23 N. E. 222; *Walsh v. Young*, 110 Mass. 396; *Chandler v. Simmons*, 97 Mass. 508, 514, 93 Am. Dec. 117.

The judge must have found that the bicycle and its use did not come under the head of necessities, and such a finding was plainly warranted as matter of law.

Exceptions overruled.

An Infant should not be allowed to rescind a contract of which he has had the benefit without accounting for such benefit or returning its equivalent: *Rice v. Butler*, 160 N. Y. 578, 73 Am. St. Rep. 703, 55 N. E. 275. In this case the contract involved was for the purchase of a bicycle by the minor. The general rule is, that an infant may rescind his contract of purchase, and recover back the purchase money paid, at least if he offers to restore the property. And the vendor is not entitled to recoup for the use of the property while in the possession of the minor: See the monographic note to *Craig v. Van Bebber*, 18 Am. St. Rep. 597.

COTTER v. LYNN AND BOSTON RAILROAD COMPANY.

[180 Mass. 145, 61 N. E. 818.]

CHILD—Negligence of Parent—When Precludes Recovery for Injuries to.—If a child is injured in a public street by collision with a street-car, and there is no evidence that the child used the care which would be expected of an adult, if there is negligence on the part of its parents in allowing it to be where it was, it cannot recover. (p. 267.)

NEGLIGENCE OF PARENTS Exposing Child to Injury in a Public Street.—While the limited powers of the poor must be taken into account, as a general fact in drawing the line at which the responsibility of persons injuring a child in the public streets begins, still third persons cannot be held accountable for an accident from the fact that the parents of the child did the best they could. There is a certain minimum of precaution against danger into which infants will wander which must be taken into account before another is made to pay. (p. 268.)

NEGLIGENCE OF PARENTS Which Precludes Recovery by Child.—If a child less than three years old is left unattended in a yard fronting on a public street, in which there is considerable teaming and a line of electric cars, between which yard and street there is a gate always open, and the child strays out into the street, and, in trying to return, is run over and injured by a car, the negligence of the parents is such as to preclude any recovery by a child, where it was not using the care of a prudent person. (p. 268.)

Tort by an infant to recover for injuries sustained in being run over by an electric car. The trial judge ruled that the plaintiff was not entitled to recover, and gave verdict for the defendant; the plaintiff alleged exceptions.

W. A. Kelley, for the plaintiff.

H. F. Hurlburt and D. E. Hall, for the defendant.

¹⁴⁵ **HOLMES, C. J.** This is an action for personal injuries caused by an electric car. The plaintiff was three years and ten months old at the time of the accident, and was trying to run across the street directly in front of the car when she was run down. There is no evidence that she used the care that would be expected of an adult, and, therefore, if there was negligence on the part of her parents in allowing her to be where she was, she cannot recover: *Collins v. South Boston R. R. Co.*, 142 Mass. 301, 313, 56 Am. Rep. 675, 7 N. E. 856; *Butler v. New York etc. R. R. Co.*, 177 Mass. 191, 193, 58 N. E. 592. With regard to the latter question, ¹⁴⁶ while, as was said in the case last cited, the limited powers of the poor must be taken into account, as a general fact, in drawing the line at which the defendant's responsibility shall be-

gin, still, the other side must be considered also before a third person is made responsible for an accident, and this responsibility does not follow of necessity from the fact that the parents did the best they could. There is a certain minimum of precaution against the dangers into which infants will wander which must be taken if another is to be made to pay.

The plaintiff's parents lived in a tenement on a busy street in Lynn, where, as the plaintiff's father testified, there was considerable teaming and a line of electric cars. There were other busy streets hard by. The plaintiff had been left in charge of her mother, who had been up from a confinement only about a week and was not very strong. The mother allowed the plaintiff to go downstairs and play in the yard of the house with a boy of five. At about half-past 8 she looked out of the window, sent the boy on an errand, and saw the plaintiff, thus left unattended, for the last time before the accident, which seems to have happened between half-past 9 and 10. The size of the yard does not appear, but it had a gate, which was always open, and the plaintiff had strayed out and was trying to return when she ran into the car. It is obvious on these facts that the happening or not happening of such an accident as was likely to happen to a child of three, alone in a busy street, was left by the mother wholly to chance and the instincts of the child. Exactly what view she commanded from her window does not appear. If we assume that she could have kept her eye on the movements of her child as long as she was in the yard, she did not do so. What she could see beyond we do not know.

Of course when the case gets near the line which divides those instances in which it can be ruled, as matter of law, that the parent was negligent from those in which it can be ruled that due care was shown, it is left to the jury. But in the cases most like this in which a jury has been called in, the precautions taken were greater, or the danger was less obvious and not so great, and the time shorter during which the child was left to itself: *Creed v. Kendall*, 156 Mass. 291, 31 N. E. 6, and cases cited; *Powers v. Quincy etc. Ry. Co.*, 163 Mass. 5, 39 N. E. 345; ¹⁴⁷ *Hewitt v. Taunton Street Ry. Co.*, 167 Mass. 483, 46 N. E. 106; *McNeil v. Boston Ice Co.*, 173 Mass. 570, 54 N. E. 257; *Butler v. New York etc. R. R. Co.*, 177 Mass. 191, 58 N. E. 592; *Walsh v. Loorem*, 180 Mass. 18, ante, p. 263, 61 N. E. 222. The present case seems to us to fall on the same side of the line with *Casey v. Smith*, 152 Mass. 294, 23 Am.

St. Rep. 842, 25 N. E. 734, Grant v. Fitchburg, 160 Mass. 16, 39 Am. St. Rep. 449, 35 N. E. 84, and Hayes v. Norcross, 162 Mass. 546, 39 N. E. 282. As we have intimated, there can be no pretense that the plaintiff herself was using the care of a prudent adult: Grant v. Fitchburg, 160 Mass. 16, 39 Am. St. Rep. 449, 35 N. E. 84; Hayes v. Norcross, 162 Mass. 546, 39 N. E. 282.

Exceptions overruled.

The Negligence of a Parent cannot, by the weight of authority, be imputed to his child: Ives v. Welden, 114 Iowa, 476, 89 Am. St. Rep. 379, 87 N. W. 408; Roanoke v. Shull, 97 Va. 419, 75 Am. St. Rep. 791, 34 S. E. 34. Such negligence, however, may bar the parent's right of recovery for injuries sustained by the child: See the monographic note to Barnes v. Shreveport City R. R. Co., 49 Am. St. Rep. 406-408; as where he is permitted to wander into the street: Grant v. Fitchburg, 160 Mass. 16, 39 Am. St. Rep. 449, 35 N. E. 84. But see Walsh v. Loorem, 180 Mass. 18, 61 N. E. 222, ante, p. 263, and cases cited in the cross-reference note thereto. In Fox v. Oakland etc. St. Ry. Co., 118 Cal. 55, 62 Am. St. Rep. 216, 50 Pac. 25, it is held, though we think erroneously, that evidence of the parents' poverty is not admissible in such a case as tending to aid the jury in determining the question of the parents' negligence.

HOMER v. BARR PUMPING ENGINE COMPANY.

[180 Mass. 163, 61 N. E. 883.]

A RECEIVER of a Corporation has no right to sue outside of the jurisdiction appointing him, unless he is actually or virtually an assignee of the claim upon which he brings the action. (p. 270.)

RECEIVER—Pleading in Actions by.—In an action by a receiver of a foreign corporation, he must, under the general denial, prove that he is authorized to bring actions in his own name in the courts of the state. (p. 271.)

Action of contract by a receiver of a corporation organized under the laws of the state of Maryland for moneys claimed to be due for boilers furnished to the defendant as part of a plant located at Washington, D. C. The defendant and corporation pleaded payment on the general issue, and, in an amended answer, alleged that the boilers were faulty in construction to its injury, for which it sought to recoup. Defendant asked the trial judge to rule that plaintiff had no right to maintain the action as receiver. Defendant also asked for a ruling to the effect that the test applied to the boilers was not

prescribed by the contract, but it appeared that the contract did not provide for any specific test. The judge refused to rule as requested, and the jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

J. G. Robinson, for the defendant.

B. E. Crowell, for the plaintiff.

¹⁶⁴ KNOWLTON, J. The plaintiff sued as a receiver of a foreign corporation, and averred in different counts of his declaration that the defendant was liable to him as such receiver, under a contract and on account of transactions with the corporation. The answer to this part of the case is a general denial.

The law in regard to the right of receivers of corporations to sue in their own name on claims due the corporation has often been considered, and the general rule in this commonwealth and in some other jurisdictions is that a receiver has no such right that follows him beyond the jurisdiction of the tribunal that appoints him, unless he is actually or virtually an assignee of the claim which he seeks to enforce: *Amy v. Manning*, 149 Mass. 487, 21 N. E. 943; *Wilson v. Welch*, 157 Mass. 77, 31 N. E. 712; *Buswell v. Order of the Iron Hall*, 161 Mass. 224, 36 N. E. 1065; *Fort Payne Coal etc. Co. v. Webster*, 163 Mass. 134, 39 N. E. 786; *Ewing v. King*, 169 Mass. 97, 47 N. E. 597; *Howarth v. Lombard*, 175 Mass. 570, 56 N. E. 888; *Hayward v. Leeson*, 176 Mass. 310, 325, 57 N. E. 656.

In the present case there is nothing to show that the plaintiff is an assignee of the corporation's property, or that he has any authority to sue in his own name other than an appointment as receiver by the circuit court of Baltimore city in the state of Maryland, which appointment authorized him to sue in that state, either in his own name or in the name of the corporation. The auditor found that under the law of Maryland a receiver of a corporation appointed in another state in the usual way, with a right under the judicial decisions of the foreign state to sue ¹⁶⁵ in its courts in his own name, is not authorized to bring an action in his own name in Maryland. In this respect the law of that state seems to be like our own. He also decided that under our law this action could not have been maintained without substituting the corporation as plaintiff for the receiver, if the question had been properly raised by the pleadings.

On the facts found we are of opinion that the action cannot be maintained in its present form. The plaintiff's declaration leaves upon himself the burden of showing that he is a receiver authorized to bring the action in our courts in his own name. In order to recover, he must prove that the defendant is now liable to him as receiver, in such a sense that in the present form of action he is entitled to a favorable judgment from the court. The defendant's general denial puts this averment in issue, and the ruling on this part of the case should have been in favor of the defendant.

We see no other error in the matters excepted to. The defendant's requests in regard to a test referred to in the contract seem to have been founded on a mistaken view of the contract. The instructions on this part of the case were correct.

Exceptions sustained.

A Foreign Receiver cannot maintain an action at law in his own name without having the legal title to the matter or thing in issue: *Murtey v. Allen*, 71 Vt. 377, 76 Am. St. Rep. 779, 45 Atl. 752; monographic note to *Alley v. Caspari*, 6 Am. St. Rep. 185. But see *Small v. Smith*, 14 S. Dak. 621, 86 N. W. 649, 86 Am. St. Rep. 808, and cases cited in the cross-reference note thereto.

KARES v. COVELL.

[180 Mass. 206, 62 N. E. 244.]

VENDOR AND VENDEE—Partial Failure of Title.—If a vendor cannot convey all of the property according to his contract, there is a partial failure of consideration, for which the vendee may, at his election, hold the vendor liable in damages, or rescind and recover the purchase price, if the parties can be put in statu quo. (p. 273.)

VENDOR AND VENDEE—Partial Failure of Title Arising After the Contract of Purchase Was Made.—Though, when a contract to convey is made, the vendor's title is perfect, yet if afterward part of the property is lost to him by being taken for the widening of a street, the vendee may recover damages for the part thus taken, if the vendor covenanted to convey a good title free from all encumbrances. (p. 273.)

VENDOR AND VENDEE—Covenant for Title When Applies to the Time of Conveying Rather than to that of the Contract of Sale. If a contract for the sale of real property provides for the payment of part of the purchase price at a subsequent date, and that thereupon the vendor will convey "a good and clear title free from all encumbrances," the vendor is answerable for any encumbrance or failure of title arising after the sale and before the making of the deed, though not due to his fault, as where part of the property is taken for a public street. (p. 274.)

Action to recover moneys paid by the plaintiff to the defendant under a bond for the sale of real property, which was dated April 27, 1896, and, so far as material, is as follows: "The condition of this obligation is such, that whereas the said obligor has agreed to sell and convey unto the said obligee a certain parcel of real estate, situate in New Bedford and bounded as follows, namely [description]. The same to be conveyed by a good and sufficient deed of the said obligor, conveying a good and clear title to the same, free from all encumbrances. And whereas for such deed and conveyance it is agreed that the said obligee shall pay the sum of thirteen hundred dollars, of which three hundred dollars have been paid this day, and one thousand dollars are to be paid in cash upon the delivery of said deed at any time within three years from the date of this bond, with interest at the rate of six per cent per annum, the interest to be paid semi-annually, also the obligee to pay the taxes after 1896. Now, therefore, if the said obligor shall, upon tender by the said obligee of the aforesaid cash, at any time within three years from this date, deliver unto said obligee a good and sufficient deed as aforesaid, then this obligation shall be void; otherwise it shall remain in full force and virtue." The land described in the bond contained about twenty-seven square rods, of which six rods were taken in December, 1899, for the widening of a public street. The defendant tendered a conveyance of all the property except that so taken, which the plaintiff refused to accept. Judgment for the plaintiff for the amount sued for, and the defendant alleged exceptions.

T. F. Desmond, for the defendant.

W. C. Parker and E. Sullavou, for the plaintiff.

²⁰⁷ HAMMOND, J. The lot of land called for by the bond contained nearly twenty-seven square rods, and the title was to be free from all encumbrances. By reason of the taking of nearly one-fourth of it for highway purposes, between the time of the execution of the bond and the time for the delivery of the deed, the trial judge found that it was impossible for the defendant substantially to perform his contract, and that it did not appear ²⁰⁸ that this condition of things was in any way caused by the plaintiff.

No part of the money was paid for any specific part of the land, but the whole price was paid for the whole land, and

the whole land was to be free from encumbrances. The contract was entire. If, therefore, the bond is to be interpreted as an agreement to convey the whole land free of encumbrances at the time of the delivery of the deed, it is manifest that the defendant cannot do what he agreed to do, and there has been at least a partial failure of consideration in the case of an entire contract. Under these circumstances, the plaintiff may, at his election, take what the defendant can give him, and hold the defendant answerable to him in damages as to the rest, or when the parties may be put in statu quo he may rescind the contract and recover back the money he has paid. The plaintiff has chosen to rescind.

We do not understand the defendant to contest that this would be the rule if the true construction of the bond is that the title must be free from encumbrances at the time the deed is to be delivered. He contends, however, that the inability to give a good title which would excuse the plaintiff from paying the purchase price and entitle him to recover back the money already paid must be the result of a want of a good title in the obligor at the time the bond was given, or of some act of the obligor after the bond was given; and he has made an elaborate argument in support of that contention. But the contention does not seem to us sound. The argument proceeds upon the assumption that by the bond an equitable interest in the land is transferred to the obligee, and that the provision that the land shall be free of encumbrance at the time of the delivery of the deed is in the nature of a covenant like the covenant against encumbrances or of warranty in a warranty deed, or that for quiet enjoyment in a lease; and that inasmuch as these are held applicable only to encumbrances outstanding at the time of the deed or lease (*Ellis v. Welch*, 6 Mass. 246, 4 Am. Dec. 122; *Patterson v. Boston*, 20 Pick. 159), such should be the rule in the case of the bond in this case. He further argues that, inasmuch as all land is held subject to the liability to be taken for public purposes under the right of eminent domain and that where it is so taken, as in ²⁰⁹ this case, after the covenant, the taking is not regarded as a breach of the covenant (*Ellis v. Welch*, 6 Mass. 246, 4 Am. Dec. 122; *Patterson v. Boston*, 20 Pick. 159), the rule should be the same in the case of this bond.

The cases upon which the defendant relies are inapplicable. Where the title passes, as in a warranty deed or lease, it is certainly true that the covenants have reference only to rights

outstanding at the time of the delivery of the deed or lease, and that a subsequent taking by the sovereign power for public purposes is not a breach of the covenant, for the simple liability to be taken is not an encumbrance until the power has been exercised. But in the case of a bond like this, while the obligee, for certain purposes and as against the obligor, may have certain rights to the land which may be enforced in equity, still the bond is simply the preliminary contract. It contemplates and provides for another and final contract to be executed in the future, by which the legal title will pass, and the object of this preliminary contract is to settle, among other things, the terms of that final contract. It would seem to be clear that when, by the terms of this preliminary contract, it is provided that when the time comes for the execution of the final contract the land is "to be conveyed by a good and sufficient deed of the said obligor, conveying a good and clear title to the same, free from all encumbrances," the language refers to the title which is to pass by the deed, and not to the state of things existing at the time of the preliminary contract.

It follows that since the defendant is unable substantially to perform his contract, the plaintiff may rescind and recover back what he has paid. We see no material error in the manner in which the court dealt with the defendant's request for instructions.

Exceptions overruled.

If a Contract is Made for the Sale of Land, the vendor to give a warranty deed on the payment of the purchase money, and between the time of the contract and the making of the deed, a portion of the land is condemned for a railroad, damages for the taking belong in equity to the purchaser, and he cannot treat such taking as an encumbrance, and recover therefor on the covenants in the deed: *Stevenson v. Loehr*, 57 Ill. 509, 11 Am. Rep. 36.

**WORCESTER AND SUBURBAN STREET RAILWAY
CO. v. TRAVELERS' INSURANCE CO.**

[180 Mass. 263, 62 N. E. 364.]

RAILWAYS—Insurance of, Against Liability for Accident—
When Does not Include Death of Passenger.—Under a policy insuring a railway corporation "against loss from liability to any person who may, during the period of twelve months, accidentally sustain bodily injuries while traveling on any railway of the insured under circumstances which shall impose upon the insured a common-law or statutory liability for such injuries," there can be no recovery because of an accident due to the fault of the insured, if the person injured dies instantly and without conscious suffering. (p. 278.)

Contract by a street railway corporation upon a policy insuring it "against loss from liability to every person who may, during a period of twelve months, from 12 o'clock M. of August 18, 1898, accidentally sustain bodily injuries while traveling on any car of the insured, or while in a car or upon the railroad-bed or other property of the insured, under circumstances which shall impose upon the insured a common law or statutory liability for such injuries." It appeared, in the complaint, that the persons on account of whose death recovery was sought had died instantly and without conscious suffering, in consequence of bodily injuries sustained by them while traveling on one of the plaintiff's cars on its railway. A demurrer to the complaint was overruled and judgment directed to be entered for the plaintiff, but, at the request of the parties, the court reported all questions of law raised upon the demurrer and declaration for the determination of the appellate court. If error was found, final judgment must be entered for the defendant, otherwise the judgment pronounced by the trial court was to stand.

H. Parker and C. C. Milton, for the defendant.

B. W. Potter and R. A. Stewart, for the plaintiff.

²⁶⁴ **LATHROP, J.** By the terms of the policy the defendant insured the plaintiff "against loss from liability to every person who may, during a period of twelve months" from a time named, "accidentally sustain bodily injuries while traveling on any railway of the insured, or while in a car or upon the railway-bed or other property of the insured, under circumstances which shall impose upon the insured a common-law or statutory liability for such injuries."

The question presented is whether the terms of the policy are broad enough to cover the case where a person who is a traveler on the plaintiff road dies instantly and without conscious suffering, in consequence of an accident for which the plaintiff is responsible. The plaintiff contends that the terms are sufficiently broad. The defendant contends that the policy is satisfied by limiting the words used to cases of bodily injuries sustained, for which the plaintiff is liable, either at common law or by statute, to the person sustaining the injury, or to his executor or administrator, if the injured person survives the injury and subsequently dies.

The diligence of counsel has furnished us with no case in which a policy in the terms of the one before us has been construed, and we are obliged to consider the case mainly upon general principles.

It may be conceded that the policy is to receive a reasonable construction, in view of the plaintiff's business (*Mandell v. Fidelity etc. Co.*, 170 Mass. 173, 64 Am. St. Rep. 291, 49 N. E. 110); but when we have said this we have not advanced very far, for it is obvious that the parties may not have intended that all the risks incurred by the plaintiff as a common carrier of passengers should be covered. Whatever was their actual intention, we are obliged to determine the intent from the natural meaning of the language used, viewed in the light of the attendant circumstances.

It is plain that an accident insurance policy may insure a person against an injury caused by an accident, or against death resulting from an accident, or it may combine the two. All these forms are or have been in use. It cannot be said, therefore, that in the policy before us death is necessarily included.

In this commonwealth there is no common-law liability for death: *Carey v. Berkshire R. R. Co.*, 1 Cush. 475, 48 Am. Dec. 616; *Moran v. Hollings*, 125 Mass. 93. Nor is there any statute which gives a right of action for the death of a person to his executor or administrator as an asset of the estate. In all the statutes which have allowed an executor or administrator to bring an action on account of the killing of a person by the negligence of a corporation or its servants, the action is for the benefit of the widow, children or next of kin: Pub. Stats., c. 112, sec. 212; Stats. 1886, c. 140; Stats. 1887, c. 270; Stats. 1898, c. 565.

An action for a personal injury, which has accrued to a person in his lifetime, survives, since the Statutes of 1842, chapter

89: Pub. Stats., c. 165, sec. 1. But there is nothing in the statutes above cited which recognizes any right of survivorship in case of death. The power to recover in such a case was first given by an indictment, and a fine was imposed for the benefit of the widow, etc., of the deceased. While an action of tort was afterward allowed, the relief obtained was devoted to the same use, and not to the estate of the person killed.

The difference between the right to recover for an injury and for a loss by death has been recognized in our decisions. Thus, under the Statute of 1879, chapter 297, which gave, among other things, a right of action to a wife, injured in her means of support by reason of the intoxication of her husband, against a person causing the intoxication, it was held that no action lay for death caused by intoxication: *Barrett v. Dolan*, 130 Mass. 366, 39 Am. Rep. 456.

The Published Statutes, chapter 52, section 17, give a right of action not exceeding one thousand dollars to the executor or administrator of a person killed by reason of a defect or want of repair in a highway, etc., for the use of the widow and children. Section 18 gives a right of action to a person who "receives or suffers bodily injury" under similar circumstances. These two actions are independent; and both may be maintained, if warranted by the evidence. Thus, in *Bowes v. Boston*, 155 Mass. 344, 349, 29 N. E. 633, it was said by Mr. Justice Knowlton: "The right to recover damages suffered in his ²⁰⁶ lifetime by one who dies from an injury received on a highway survives to his administrator for the benefit of his estate, and the damages are estimated on the theory of making compensation. . . . The action by an administrator, under section 17, on account of his intestate's loss of life, is to recover a sum not exceeding one thousand dollars for the benefit of the widow and children or of the next of kin of the deceased, to be estimated according to the degree of culpability of the defendant. Both actions, under the statute, may proceed at the same time, on independent grounds and for different purposes."

We are not aware of any legislation in this commonwealth giving a right of recovery for personal injuries, which has been construed to give a right of action for death. Nor are we aware of any legislation giving the right of recovery for death, in which the fact of bodily injury to the deceased is made an element in the computation of damages. The statutes generally give damages for death between certain fixed limits, according to the degree of culpability of the defendant. They

give a new right of action to the executor or administrator, and not a right of action to the deceased, which goes to the executor or administrator by survival only: *Commonwealth v. Boston etc. R. R. Co.*, 134 Mass. 211, 213; *Littlejohn v. Fitchburg R. R. Co.*, 148 Mass. 478, 483, 20 N. E. 103; *Mulhall v. Fallon*, 176 Mass. 266, 268, 79 Am. St. Rep. 309, 57 N. E. 386.

By the terms of the policy the plaintiff is insured against loss from liability to every person who may accidentally sustain bodily injuries, under circumstances which impose upon the insured a common-law or statutory liability for such injuries. The liability is to a person who sustains bodily injuries, and such person must have a right of action therefor, either at common law or by statute. The policy cannot include the case of death, for which the person never had a right of action.

According to the terms of the report the order must be, in the opinion of a majority of the court, judgment for the defendant.

MORTON, J. I regret that I am unable to agree with the majority of the court. The question is one of construction, and is whether, in the language of Lord Cairns, in *Sackville-West v. Holmesdale, L. R. 4 H. L. 543, 574*, we shall servilely follow ²⁶⁷ the literal sense of the words used, which I agree can be done, or whether we shall construe them liberally, and in a manner more in accord with the nature of the contract and the situation of the parties. It seems to me that the latter course should be followed.

The contract is one of indemnity against loss from liability for personal injuries caused by accidents for which the plaintiff was responsible, and the precise question is whether the liability of the plaintiff, which is a street railway company, for damages for death caused by its negligence, comes fairly within the terms of the policy. At common law damages for death caused by the negligence of another person were not recoverable. But such damages are now recoverable by statute in this state and in other states in many cases, and in England generally, and it seems to me that that fact should be borne in mind in construing the policy before us: *Pub. Stats.*, c. 52, sec. 17; *Pub. Stats.*, c. 112, sec. 212; *Stats. 1886*, c. 140; *Stats. 1887*, c. 270, sec. 2; *Stats. 1898*, c. 565; *Stats. 9 & 10 Vict.*, c. 93; *Sedgwick on Damages*, sec. 571.

It is undoubtedly true that such damages do not constitute, generally speaking, assets of the estate of the deceased, and that the right of action is a new one. But it does not follow that the

liability to loss on account of personal injuries which is insured against may not be fairly construed to include such damages. Parties well may be supposed to contract with reference to new conditions, though they use the old terms, and the old terms will be given a new content if they fairly admit of such a construction and such appears to have been the intention of the parties. The ground on which damages for death are allowed is that a person causing the death of another by his negligence should not be suffered to escape liability therefor. And whether the damages assessed are awarded according to the culpability of the defendant as in the employer's liability act in this state, or according to the pecuniary loss sustained by the family of the deceased as in the English act, they go in fact, though not in terms, to those to whom the estate of the deceased passes at his death. The fact, therefore, that such damages do not, strictly speaking, constitute assets of the estate of the deceased person would not seem to be of vital consequence, if we look at substance rather than form. There can be no doubt that ~~as~~ it is and was understood by street railway companies and by liability insurance companies, that damages for death caused by the negligence of the railway companies are recoverable in actions against them therefor. It is obvious that there can be no good reason why a railway company should wish to protect itself against liability for damages when the injury did not result in death, and not against liability for damages for death. Of course, a contract is not to be construed according to the understanding of one party to it. But it is equally obvious, I think, that the matter would present itself in the same light to an insurance company. It seems to me, therefore, that the words in the policy, "against loss from liability to every person who may," etc., should be construed as meaning "liability in respect to every person who may," etc., and as having regard, not to the extent of recovery, or the nature of the remedy, but to the subject of the injury. The application, which is made a part of the policy, begins by saying that the railway company applies for a railway policy. The policy that was issued is entitled "Street Railway Liability Policy." Evidently a railway liability policy was and is a well-known form of insurance. Assuming, as we are bound to do, good faith on the part of the insurer and insured, it is difficult, it seems to me, to believe that, as business men, those in charge of railway and insurance companies could have intended or understood the insurance to have the partial character given to it by the majority of the court. The appli-

cation goes on to provide that, "if the applicant shall fail to comply with the requirements of any law, by-law, or ordinance respecting the safety of persons, the policy shall not cover injuries resulting from such failure." There is nothing here to show that death resulting from the failure spoken of was not one of the injuries contemplated. It would be an extraordinary construction to say that the safeguards provided for related to lesser injuries, but not to death. In the statements contained later in the application in regard to persons injured and suits against the road for damages and apparently required of the plaintiff by the defendant, there is nothing which tends in the least to show that cases of death were in fact excluded, or were intended to be excluded, in considering the nature of the risk or the liability insured against. The application contains nothing, I think, ²⁶⁹ which, fairly construed, excludes from or does not include in the insurance applied for the liability for damages for death. Neither is there anything in the policy, it seems to me, which requires a construction of the words describing the risk that will exclude liability for damages for death. Such a liability, as already observed, is a statutory one. But the policy expressly provides that the liability insured against shall include statutory as well as common-law liabilities. Among the conditions contained in the policy, and to which the insurance was subject, were the following: that the defendant's liability shall not exceed twenty thousand dollars "for all injuries . . . consequent upon any one accident"; that "this policy shall not take effect unless the premium is paid previous to any accident under which claim is made"; that "this insurance does not cover claims upon which suit shall be commenced after six years from the date of the accident"; that in case of loss covered by other like insurance, the company shall be liable only for its pro rata share, and shall be subrogated to the plaintiff's rights against any third person; and that immediate written notice shall be given of any accident and of all claims made by injured persons with all the information in the plaintiff's possession relating to the accident or any claim made on account thereof. These provisions, which contain the more important conditions, are, to say the least, as consistent with the view that damages for death are included in the risk as with the view that they are not. "Accidents," "injuries," "claims" and "losses" are spoken of without distinguishing between cases in which the accident or injury resulted in death and cases where it did not, or between claims which included damages for death and those which did not.

Of course it may be said that when the risk has once been defined all other provisions in the policy are to be construed as relating to the risk so defined. But the question in this case is, What was the risk that was insured against? And in answering that question, the nature of the contract, the provisions contained in the application and policy, and the effect of the construction contended for on the one side and the other, are all, I think, to be taken into account. The effect of the construction adopted by the majority of the court will be to limit the plaintiff's right of recovery, in respect to statutory liabilities to cases where a right ²⁷⁰ of action has been given by statute to persons injured and passes by statute on their death to their executors or administrators. It will exclude a class of cases—equally important, to say the least—in which a right of action has been given to the executor or administrator, or to the widow or next of kin, to recover damages for the death of a person injured by the negligence of a railway company. Such a construction does not seem to me to be a reasonable one. It is said that bodily injuries do not include death. But, as already observed, the matter is one of construction. There is nothing in the words themselves to prevent them from being so construed, if it is apparent that the parties so used them. Moreover, it is provided by the employers' liability act that, if the death is preceded by conscious suffering, or is not instantaneous, damages for the death may be recovered by the executor or administrator in the action for personal injuries: Stats. 1892, c. 260, sec. 1. The use and construction of the words in the policy as including death and the liability to loss for damages for death is, therefore, warranted by the statute.

For these reasons it seems to me that the ruling was right and that the judgment should be affirmed.

Mr. Justice Barker concurs in this opinion.

Justices Barker and Morton Dissented, and expressed their dissent in an opinion written by the latter. They claimed that the court ought not to servilely follow the literal sense of the words, but should construe them liberally and in a manner in accord with the nature of the contract and the situation of the parties; that there was no good reason why the company should wish to protect itself against liability for damages when the injuries did not result in death, and not include liability for damages for death; that there was nothing in the policy to indicate that death resulting in the manner described in the complaint was not one of the injuries contemplated.

A *Railway Company* may contract with a news company for indemnity from any loss it may sustain by having to pay for injuries to employes of the news company, while on its cars. And this contract may cover the railway's liability for the death of a newsboy: *Kansas City etc. R. R. Co. v. Southern Ry. News Co.*, 151 Mo. 373, 74 Am. St. Rep. 545, 52 S. W. 205.

BUTHERFORD v. PADDOCK.

[180 Mass. 289, 62 N. E. 381.]

SLANDER—Pleading.—The justification of slanderous words must be as broad as the charge. (p. 283.)

SLANDER—Charging one with being "a dirty old whore" is not justified by proof of adultery on different occasions with the same person, if the jury is of the opinion that the charge meant that plaintiff made merchandise of her person, for hire. (p. 285.)

Tort for slander. The plaintiff alleged that she was a married woman, and that the defendant "publicly, falsely, and maliciously charged her with adultery, by words spoken of the plaintiff substantially as follows: 'Take that, you [meaning the plaintiff] dirty whore. You [meaning the plaintiff] are a dirty old whore, and I can prove it. You are, and I can prove it.'"

The answer, after denying plaintiff's allegations, pleaded justification as follows: "If it shall be proved that the defendant spoke and published of the plaintiff the words as charged in the declaration, and charged the plaintiff with the crime of adultery as therein alleged, the same were true, and the plaintiff had, before said words were spoken and published, committed the crime of adultery, so that the defendant's accusation was true." At the trial there was evidence tending to show that the plaintiff had committed adultery on two or three occasions with the same person. The defendant requested the judge to rule as follows: "The words as alleged in the declaration are actionable, without proof of special damage, only because they charge the plaintiff with, or impute to her, the commission of a crime—the crime of adultery. The defendant therefore justified if she proves that before the words were spoken the plaintiff had committed the crime of adultery. It is not necessary for her to prove, in order to justify, the full truth of the words spoken—i. e., that the plaintiff was a whore in the ordinary acceptance of the

word, if she proves that defendant had committed the only crime which those words import, to wit, the crime of adultery." The judge refused to so rule, and left the case to the jury, which returned a verdict for the plaintiff, and the defendant alleged exceptions.

G. S. Taft, for the defendant.

J. R. Thayer, A. P. Rugg, and S. B. Taft, for the plaintiff.

²⁹⁰ HOLMES, C. J. This is an action of tort brought by a married woman for calling her a dirty old whore. We repeat the qualifying adjectives as bearing on what we have to say. At the trial the defendant asked for a ruling that a justification was made out by proof that before the words were spoken the plaintiff had committed adultery. The judge refused so to rule, but left it to the jury to decide in what sense the words were used, ²⁹¹ and instructed them that the justification must be as broad as the charge. On this ground the judge further instructed them that proof that the plaintiff had committed adultery at some time would not be a justification, if, that is to say, the jury should be of opinion that the words meant more than the charge of the act on a single occasion, and imported, for instance, making merchandise of the plaintiff's person for hire. The defendant excepted.

No special reference was made to the pleadings in the request or ruling, and so we lay on one side the fact that the justification pleaded followed the innuendo of the declaration, which went little or no further than to aver that the defendant charged the plaintiff with the crime of adultery: See *Simmons v. Mitchell*, 6 App. Cas. 156, 162; *Haynes v. Clinton Printing Co.*, 169 Mass. 512, 515, 48 N. E. 275. Of course the judge was right in his instruction that the justification must be as broad as the charge. Apart from the pleadings, clearly the jury were at liberty to find that the words charged the commission of adultery on more than one occasion, and therefore the ruling requested was wrong.

But, as a general rule, the justification need be no broader than the charge in a legal sense—than the actionable portion or significance of the words. It need not extend to the further abuse with which a sentence or word may be loaded, where the truth of the substance of the imputation has been made out: *Morrison v. Harmer*, 3 Bing. N. C. 759, 767. *Edwards v. Bell*, 1 Bing. 403, 409. The judge, by suggesting that usually the

epithet carried the notion of hire, implied that if that meaning were found the justification must extend to that. There is no doubt that the jury were warranted in finding that the epithet with its adjectives meant more and worse in a social sense than even repeated lapses from conjugal faith. But it would be rather a stretch to say, and it was not argued, that they could have found that any other crime was charged—for instance, that of being a common night-walker, or a lewd, wanton and lascivious person in speech or behavior under Public Statutes, chapter 207, section 29. Therefore, the question is suggested whether we are to confine the cause of action to so much of the charge as imports criminal conduct, or are to recognize as an element to be included in the ²⁹² justification such further import of the word as adds to the heinousness of the crime and possibly affects the degree of the punishment, although it does not change the technical character of the offense.

If we take the former view, we follow to its extreme results a tradition of the common law, the reasons for which have disappeared, and which has been corrected in England and in some of our states by statute: Odgers on Libel and Slander, 3d ed., 90. By the old law, apart from an allegation of special damage, an action lay in the spiritual courts only, because the offense charged was dealt with only in the spiritual courts, and it was said that therefore the spiritual courts alone could determine the truth of the charge: Y. B., 27 Henry VIII, 14, pl. 4. Perhaps it would have been simpler to say that originally the whole jurisdiction was ecclesiastical, and that it was retained by the church, except in those instances where for special reasons the common law had encroached. In Coke's time the state of the law seems to have been accounted for or justified by treating such charges as "brabbling words": Oxford v. Cross, 4 Rep. 18. But see Ogden v. Turner, 6 Mod. 104, 105; Graves v. Blanchet, 2 Salk. 696; Davis v. Sladden, 17 Or. 259, 262, 263, 21 Pac. 140. It has been suggested that the taking by the common-law courts of a portion of the original ecclesiastical jurisdiction over slander started from the fact that in the cases where the common law interfered the matter charged was the subject of a common-law writ, and that the principal matter drew to it the accessory. In such cases the common-law courts best could determine the truth of the charge: Smith v. Teutonia Ins. Co., Fed. Cas. No. 13,115, 6 Am. Law Rev. 593, 595, 603, 605. Of course at that stage the common law could not present a systematic scheme of liability, but only examples of occasional

interference which seemed merely arbitrary when the explanation was lost.

At the present day, when slander is fully domiciled in the common law as a tort and the only remedy recognized as a remedy must be found in the common-law courts, it may be argued with some force that there should be an effort after consistency of theory, and that the remedy for one of the greatest wrongs that can be done by words should not be distorted by the necessity of referring it to the liability to a small fine or imprisonment if the falsehood were true. The older law already has ²⁹³ been broken in upon by holding liability to a trivial punishment enough if the crime involves moral turpitude, or if the punishment will bring disgrace: See *Miller v. Parish*, 8 Pick. 384; *Brown v. Nickerson*, 5 Gray, 1. Compare *Turner v. Ogden*, 2 Salk. 696, 6 Mod. 104; *Onslow v. Horne*, 2 W. Black. 750, 753, 3 Wils. 177, 186; *Holt v. Scholefield*, 6 Term Rep. 691, 694; *Eure v. Odom*, 9 N. C. (2 Hawks) 52. At all events, so long as the action for slander is preserved and lies for imputing unchastity to a woman, it is so reasonable to hold the liability co-extensive with the imputation that we shall not be more curious than our predecessors in finding an arbitrary and technical limit. In *Doherty v. Brown*, 10 Gray, 250, 251, it was said by a very able judge, and said as a material part of the reasoning on which the case was decided, that proof of the unchastity of the plaintiff would not be a justification of the charge that she was a whore. We are content to take the law as we find it stated: See *Cleveland v. Detweiler*, 18 Iowa, 299; *Sheehey v. Cokley*, 43 Iowa, 183, 22 Am. Rep. 236; *Peterson v. Murray*, 13 Ind. App. 420, 41 N. E. 836.

Exceptions overruled.

JUSTIFICATION IN SLANDER AND LIBEL.

- I. Scope of the Note.
- II. Defenses not Amounting to Justification Because not Affirming the Truth of the Defamatory Matter.
 - a. Want of Injury to Plaintiff.
 - b. The Existence of Prior Reports to the Same Effect.
 - c. Belief in the Truth of the Defamatory Charge.
 - d. Apology or Retraction.
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- III. Truth as a Defense.
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- a. Where Defendant Used Part Only of the Defamatory Words.
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- g. Joining Justification With Inconsistent Pleas.
- h. Effect in Aggravating Damages, or as Evidence of Malice.
- i. Withdrawal of the Plea.

VI. Evidence of Justification.

- a. Burden of Proof.
- b. The Degree or Amount of Proof Required.
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- c. Evidence Admissible and Necessary to Justify a Charge of Crime.

I. Scope of Note.

We have heretofore given special attention to the subject of newspaper libel for the purpose of showing to what extent, if at all, the law applicable to other persons may be regarded as equally applicable to persons or corporations engaged in the publication of journals whose object it is to collect and disseminate news, and also to criticise individuals, whether public or private (note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 333-369), and we shall not again enter upon the consideration of this topic, except in so far as it may be incidentally and necessarily involved in the question of justification. Neither shall we here discuss under what circumstances the publisher of a libel or slander may be exempt from liability on the ground that his communication was privileged. Justification, as applied to the law of slander and libel, does not imply that something has been done which is privileged, or excused on account of some duty owing by the publisher to the public, or to the person to whom the publication was made. Nor does justification involve the question

of the circumstances which, though not excusing the wrongdoer from liability, tend to mitigate his offense, when he is prosecuted in a criminal proceeding, and to reduce the damages which may properly be assessed against him in a civil action. In truth, strictly speaking, there can be no justification of a slander or libel. The defense of justification always implies that no slander or libel has been committed, or, in other words, that what has been said or written is true. Hence this note will be taken up with showing that the only absolute justification to an alleged slanderous or libelous publication is its truth, and with considering the pleadings and evidence in support of the plea of justification. That nothing except the truth is a plea in justification may, perhaps, be more fully demonstrated by considering some of the defenses which have commonly been offered and held insufficient.

II. Defenses not Amounting to Justification Because not Affirming the Truth of the Defamatory Matter.

a. **Want of Injury to the Plaintiff**, however it may affect the damages to be awarded, is not a justification of a slander or libel, where the words charged are not true. They may have been spoken to a person who did not believe them, or knew absolutely that they were false, and hence may not injuriously affect the plaintiff's reputation. Still a right of action in his favor is created which cannot be destroyed by proof of the absence of injury to him, or that all the persons hearing or reading the false reports knew of their falsity and gave no credence to them: *Marble v. Chapin*, 132 Mass. 225; *Burt v. McBain*, 29 Mich. 260; *McMeans v. Calhoun*, 1 Nott & McC. 422.

b. **The Existence of Prior Reports to the Same Effect.**—For the purpose of mitigating damages, or, in other words, of showing that little or no injury has resulted to the plaintiff, the defendant may prove that he repeated prior reports already in general circulation. Such reports, however, do not constitute a justification, and evidence of them, when admissible, must be received only for the purpose of reducing damages. The repetition of a slander or libel originated by another is a republication of it, and cannot be justified by prior reports, however extensively circulated: *Lewis v. Niles*, 1 Root, 346; *Richardson v. Roberts*, 23 Ga. 215; *Funk v. Beverly*, 112 Ind. 190, 13 N. E. 573; *Cade v. Redditt*, 15 La. Ann. 492; *Harris v. Minvielle*, 48 La. Ann. 908, 19 South. 925; *Clark v. Munsell*, 6 Met. 373; *Kenney v. McLaughlin*, 5 Gray, 3, 66 Am. Dec. 345; *Brewer v. Chase*, 121 Mich. 526, 80 Am. St. Rep. 527, 80 N. W. 575; *Moberly v. Preston*, 8 Mo. 462; *World P. Co. v. Mullen*, 43 Neb. 126, 47 Am. St. Rep. 737, 61 N. W. 108; *Mapes v. Weeks*, 4 Wend. 659; *Nelson v. Evans*, 12 N. C. (1 Dev.) 9; *Johnston v. Lance*, 29 N. C. (7 Ired.) 448; *Upton v. Hume*, 24 Or. 420, 41 Am. St. Rep. 863, 33 Pac. 810. Nor can justification be made out by proving that the defendant, at the time of uttering the defamatory charge, declared that he was stating only a general report: *Funk v. Beverly*, 112 Ind. 190, 13 N. E. 573; *Wheeler v. Shields*, 2 Scam. 348; *Waikin v. Hall*, L. R. 3 Q. B. 396; or that he

was repeating a charge maintained by some specified person, giving the name of the latter: *Dole v. Lyon*, 10 Johns. 447, 6 Am. Dec. 346; *McPherson v. Daniels*, 10 Barn. & C. 263, 5 M. & R. 251.

c. **Belief in the Truth of the Defamatory Charge** does not constitute any justification for its publication. It is not material for this purpose that the belief was entertained upon apparently sufficient grounds: *Woodruff v. Richardson*, 20 Conn. 238; *Fountain v. West*, 23 Iowa, 9, 92 Am. Dec. 405; nor that the plaintiff, by his conduct, created the belief on the part of the defendant: *Parkhurst v. Ketchum*, 6 Allen, 406, 83 Am. Dec. 639; *Clark v. Brown*, 116 Mass. 504; *Morgan v. Rice*, 35 Mo. App. 591; *Fry v. Bennett*, 3 Bosw. 200; *Holmes v. Jones*, 147 N. Y. 59, 49 Am. St. Rep. 646, 41 N. E. 409; *Wozelka v. Hettrick*, 93 N. C. 10; as where the plaintiff, by taking property in jest, induced the belief that he had committed larceny: *Clark v. Brown*, 116 Mass. 504.

d. **Apology for Retraction** usually tends to diminish the damages of the defamatory publication, and hence may always be proved in mitigation of damages. It can never, however, constitute a complete defense, and hence, as a plea in justification, must be declared entirely inadequate: *Storey v. Wallace*, 60 Ill. 51; *Cass v. New Orleans Times*, 27 La. Ann. 214; *Williams v. McManus*, 38 La. Ann. 161, 58 Am. Rep. 171; *Davis v. Marxhausen*, 103 Mich. 315, 61 N. W. 504.

e. **Defendant's Construction of the Words Used by Him.**—Defendant's intent is not material so far as the question of justification is involved. It is not sufficient that his motives were good. Neither can he be justified on the ground of any special construction he may have intended to be put upon the words used by him: *Mitchell v. Spradley*, 23 Tex. Civ. App. 43, 56 S. W. 134. "The question is, What effect would the publication have upon the mind of the ordinary reader? What construction would he have put upon it? For, in defamatory language, it is not so much the idea which the speaker or writer intends to convey, as what he does in fact convey. It is the effect upon the character of the person alleged to be defamed by the utterance which the law considers, and therefore the utterer uses the language at his peril": *Belo v. Smith*, 91 Tex. 221, 42 S. W. 850. Other illustrations might be added, all tending to confirm what we have already stated, that there can be no justification which does not amount to an affirmance of the truth, in all its essential details, of the defamatory publication of which the plea is made.

III. Truth as a Defense.

a. **In Civil Actions**, as already suggested, truth is the only complete justification. That it is a justification in all civil actions, whether for slander or libel is generally, though not universally, conceded: *Henderson v. Fox*, 83 Ga. 233, 9 S. E. 839; *Heilman v. Shanklin*, 60 Ind. 424; *Castle v. Houston*, 19 Kan. 417, 27 Am. Rep. 127; *Mundy v. Wight*, 26 Kan. 173; *Boldon v. Thompson*, 60 Kan. 856, 56 Pac. 131; *Batcliff v. Louisville Courier-Journal Co.*, 99 Ky. 416, 23

S. W. 177; Rayne v. Taylor, 14 La. Ann. 406; Sullings v. Shakespeare, 46 Mich. 408, 41 Am. Rep. 166, 9 N. W. 451; Simons v. Burnham, 102 Mich. 189, 60 N. W. 476; McAtee v. Valandingham, 75 Mo. App. 45; Kelly v. Taintor, 48 How. Pr. 270; Huff v. Bennett, 4 Sand. 120; Fry v. Bennett, 3 Bosw. 200; Joannes v. Jennings, 6 N. Y. Sup. Ct. Rep. 138; George v. Jennings, 4 Hun, 66; Fulkerson v. George, 3 Abb. Pr. 75; Press Co. v. Stewart, 119 Pa. 584, 14 Atl. 51; Perry v. Man, 1 R. I. 263; Haynes v. Spokane C. P. Co., 11 Wash. 503, 39 Pac. 969; Whitney v. Janesville Gazette, 5 Biss. 330, Fed. Cas. No. 17,590; and its effect as a plea in defense is not diminished by showing that the words, though true, were spoken in malice: Foss v. Hildreth, 10 Allen, 76; Perry v. Porter, 124 Mass. 338; or that the knowledge of their truth did not come to the defendant until after they were spoken: Cox v. Strickland, 101 Ga. 482, 28 S. E. 655. In several of the states, however, the rule still obtains in civil actions for libel that the defendant may be held answerable, though the defamatory statements made by him were true, if he was actuated by malice or mischievous intent (Delaware etc. Co. v. Croasdale, 6 Houst. 181), or if his publication was not made for good motives and justifiable ends: Wilson v. Marks, 18 Fla. 322; Jones v. Townsend, 21 Fla. 431; Perret v. New Orleans Times, 25 La. Ann. 170; Sweeney v. Baker, 13 W. Va. 205; McClaugherty v. Cooper, 39 W. Va. 313, 19 S. E. 415.

In Nebraska, the rule has been somewhat varied by a declaration of the constitution. Generally, the provisions of the American constitutions, so far as they relate to this subject, have tended not merely to require the admission of the truth, but to make it a complete justification in criminal, as well as civil, cases; but the constitution of this state declares that "in all trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense. . . . From this it would seem that even the truth is not a complete defense in an action for libel, unless the libel was published with good motives and for justifiable ends": Pokrok Z. P. Co. v. Zizkovsky, 42 Neb. 64, 60 N. W. 358. The effect of this constitutional provision was considered in Neilson v. Jensen, 56 Neb. 430, 76 N. W. 866, where the court said: "In a civil case, at common law, the truth of the charge published was a defense to one who was sued for libel; but our constitution has changed this rule, and a publisher may not be exempt himself from liability for libeling another simply by showing that the charge published was true, but must go further and show that the publication was made under such circumstances as would justify the conclusion that he acted with good motives, and for justifiable ends. The framers of the constitution may have been of the opinion that the peace, good order, and well-being of the state would be best subserved if every citizen devoted at least a part of his time to attending to his own business, instead of constituting himself an agent for bruiting abroad the short-comings

of his neighbor; but whatever may have been their motives, the provision on the subject of libel is a part of the supreme law of the land. What motives induced the publication of the libel is, of course, a question of fact; and whether these motives warrant the conclusion that the publication was justifiable is probably for determination by the jury or other triers of fact."

b. In Criminal Prosecutions.—By the common law, it is well known that in criminal prosecutions for libel the truth of the defamatory charge did not alone constitute a justification for its publication: *Commonwealth v. Clap*, 4 Mass. 163, 3 Am. Dec. 212; *Commonwealth v. Blanding*, 3 Pick. 304, 15 Am. Dec. 215; *Commonwealth v. Morris*, 1 Va. Cas. 175, 5 Am. Dec. 515. This is because falseness is no part of the common-law definition of a criminal libel: *Newhall on Slander and Libel*, 2d ed., 937. In the United States the common-law rule has been generally modified, and in some of the states abolished, either by constitutional or statutory provisions, in which the truth of the libelous charge is admissible in justification in criminal prosecutions, provided it further appears that the publication was made with good motives and for justifiable ends: *State v. Rice*, 56 Iowa, 431, 9 N. W. 843; *State v. Haskins*, 109 Iowa, 656, 80 N. W. 1063; *Castle v. Houston*, 19 Kan. 417, 27 Am. Rep. 127; *State v. Bienvenu*, 36 La. Ann. 378; *Commonwealth v. Snelling*, 15 Pick. 337.

IV. Partial Justification.

a. Where Defendant Used Part Only of the Defamatory Words.—The question of whether there may be a partial justification of a libel, or, in other words, whether the defendant may, under a plea of justification, show that the alleged defamatory matter was partially true, may be considered with reference (1) to those cases in which the defendant admits or is shown to have been responsible for or guilty of, publishing part only of such matter, and seeks to justify with respect to such part, and (2) to cases in which, though he published or uttered all the alleged libelous words, he wishes to undertake to prove part only of them to be true. In the cases of the first class, there can be no doubt in reason and principle that he need not justify to any divisible part of the libel or slander of which he was not guilty, but may deny the publication of the words for whose publication he is not in fault, and as to the balance, may justify by showing that it was true: *Cloidt v. Wallace*, 56 Ill. App. 389; *Hollingsworth v. Spectator Co.*, 53 App. Div. 291, 65 N. Y. Supp. 812. It is always permissible for the defendant to deny uttering or publishing any part of the defamatory matter attributed to him: *Palmer v. Smith*, 21 Minn. 419. "The plea or notice of justification must aver the truth of the material and substantial charges, or of each substantial and libelous charge, in language as broad as the charge, in its full and legal sense; and although, where there are separate and distinct charges in the same libel, it is allowable in the same plea or notice to plead the general issue as

to a part, and justify as to the other charges, yet it is essential that the plea or notice should substantially answer the whole count or ground of action declared on": *Van Derveer v. Sutphin*, 5 Ohio St. 293. "Where the words charged are divisible without materially changing the sense, or constitute two distinct slanders or charges against plaintiff, the defendant may justify one and rely on the general issue in defense of the other": *Nott v. Stoddard*, 38 Vt. 25, 88 Am. Dec. 633.

b. Where Defendant Seeks to Establish the Truth of Part Only of the Words Used by Him.—If, on the other hand, defendant was guilty, of publishing the whole of the alleged defamatory matter, he cannot justify by showing that some part, though divisible from the rest, was true: *Tull v. David*, 27 Ind. 377; *Hake v. Bramea*, 95 Ind. 161; *Miller v. McDonald*, 139 Ind. 465, 39 N. E. 159; *Whittemore v. Weiss*, 33 Mich. 348; *Thompson v. Pioneer P. Co.*, 37 Minn. 285, 33 N. W. 856; *Morgan v. Rice*, 35 Mo. App. 591; *Nelson v. Jensen*, 56 Neb. 430, 76 N. W. 866; *Stilwell v. Barter*, 19 Wend. 487; *Collis v. Press P. Co.*, 68 App. Div. 38, 74 N. Y. Supp. 78; *Torrey v. Field*, 10 Vt. 353; *Knapp & Co. v. Campbell*, 14 Tex. Civ. App. 199, 36 S. W. 765. This is upon the principle that, though the plaintiff may have committed one or more crimes, or been guilty of one or more acts tending to discredit him in the public esteem, the defendant is not therefore justified in charging him with additional crimes or acts of which he was innocent: *Peoples v. Evening News*, 51 Mich. 11, 15 N. W. 185, 691; *Young v. Fox*, 26 App. Div. 261, 49 N. Y. Supp. 634; *Holmes v. Jones*, 121 N. Y. 461, 24 N. E. 701; *Lanpher v. Clark*, 149 N. Y. 472, 44 N. E. 182; *Edwards v. Kansas City T. Co.*, 32 Fed. 813. In such a case, however, it is clear that the plaintiff, if guilty of some of the acts or crimes imputed to him, is less injured than if innocent at all. The general declaration met with so frequently in the decisions, that the justification must be as broad as the charge, tends to mislead by producing the impression that, unless the defendant can prove the truth of all the charges made by him, it is useless, or even dangerous, to prove any. We apprehend that all that is meant by this general declaration, wherever made, is that nothing less than proof of the whole charge made by defendant can entitle him to a verdict. This must be so, if, as is already suggested, he is not justified in making a false charge by the fact that other charges made by him are true; but it cannot be true that where by the plea or evidence it appears that some only of the charges made by defendant are false, plaintiff can be entitled to damages as if all had been admitted or shown to be so: *Kerr v. Force*, 3 Cranch C. C. 8, Fed. Cas. No. 7730. The proper mode of pleading when the defendant wishes to show that some only of the charges made by him are true, we shall hereafter consider. Where, however, the plea is sufficient to warrant the reception of evidence of the partial truth of the charge, it is admissible to mitigate damages: *Jones v. Greeley*, 25 Fla. 629, 6 South. 448; *Stacy v. Portland P. Co.*, 68 Me. 279; *Hay v. Reid*, 85

Mich. 296, 48 N. W. 507. But, if the libel contains but one substantial charge, it must be regarded as indivisible, and the defendant cannot be permitted to justify as to some clause or sentence only: *Palmer v. Smith*, 21 Minn. 419. "There is no such thing as a half-way justification. When several distinct things are charged, the defendant may justify as to one, though he may not be able to do so as to all; but as to any one charge, the justification will either be everything or nothing. If the charge be of stealing a horse, it is not half of a defense, nor any part of one, to show that the plaintiff took the horse by a mere trespass; or if the charge be perjury, proof that the plaintiff swore falsely through an innocent mistake amounts to nothing": *Fere v. Ruscoe*, 4 N. Y. 162. "The rule of pleading that the justification shall be as broad as the charge, does not mean that the answer in justification must be broad enough to embrace every slanderous charge stated in the complaint. When several separate and distinct things are charged, the defendant may justify as to one, though he fail as to the others. In this case the plaintiff had alleged that the defendant falsely and maliciously spoke and published of and concerning her personally, and of and concerning her place of business, that she kept a disorderly house. It is true, according to the allegations of the complaint, that he also charged her with many other things, but the charge of keeping a disorderly house was distinct and separate from all the rest, and the defendant was entitled to justify that charge if he could, though he fail as to all the rest. When the defamatory charge imputes to the plaintiff two or more separate and distinct things, as larceny or perjury, the rule that the justification must be as broad as the charge, means that it shall be full and complete as to at least one of the charges separately and distinctly made and alleged": *Lanpher v. Clark*, 149 N. Y. 472, 44 N. E. 182.

V. The Plea of Justification.

a. The General Issue or General Denial.—It was unquestionably true that the plea of general denial did not, at the common law, entitle the defendant to put in evidence a justification. In other words, it admitted the falseness of the alleged defamatory matter, and hence for no purpose was the defendant entitled to have evidence admitted in his favor if it tended to prove that the charges made by him were true: *Arrington v. Jones*, 9 Port. 189; *Douge v. Pearce*, 13 Ala. 127; *Donaghue v. Gaffey*, 53 Conn. 43, 2 Atl. 397; *Atwater v. Morning News Co.*, 67 Conn. 504, 34 Atl. 865; *Kinney v. Hosea*, 3 Harr. 397; *Sheahan v. Collins*, 20 Ill. 325, 71 Am. Dec. 271; *Burke v. Miller*, 6 Blackf. 155; *Beardsley v. Bridgman*, 17 Iowa, 290; *Miller v. Roy*, 10 La. Ann. 231; *Taylor v. Robinson*, 29 Me. 323; *Hagan v. Hendry*, 18 Md. 177; *Padgett v. Sweeting*, 65 Md. 404, 4 Atl. 887; *Alderman v. French*, 1 Pick. 1, 11 Am. Dec. 114; *Knight v. Foster*, 39 N. H. 576; *Fere v. Ruscoe*, 4 N. Y. 162; *Egan v. Gratt*, 1 McMull. 468; *Esterwood v. Quin*, 2 Brev. 64, 3 Am. Dec. 700; *McCampbell v. Thornburgh*, 3 Head, 169; *Barnes v. Webb*, 1

Tyler, 17; Grant v. Hover, 6 Munf. 13; Sweeney v. Baker, 13 W. Va. 158, 31 Am. Rep. 757; Eaton v. White, 2 Pinn. 42; Langton v. Hagerty, 35 Wis. 150. No decision or text-book has come within our observation discussing the question whether this rule ought to be, or is, applicable to the general denial under the code system of pleading, but such has always been assumed to be the rule, and therefore evidence of the truth of the defamatory matter has been excluded unless it was specially pleaded: Thrall v. Smiley, 9 Cal. 529; Fero v. Ruscoe, 4 N. Y. 162; Fenstermaker v. Tribune P. Co., 12 Utah, 439, 43 Pac. 112; Langton v. Hagerty, 35 Wis. 150; Bliss on Code Pleading, sec. 359a; Kinkad's Code Pleading, sec. 764.

b. **The Plea Must be as Broad as the Charge.**—In heretofore speaking of partial truth as a justification or defense, we have shown that the committing of one or more of the crimes or the doing of one or more of the disgraceful acts imputed to the plaintiff cannot be regarded as a justification of the other charges made against him, and therefore that there can be no complete justification which does not allege the truth, or at least, the substantial truth of the defamatory language used by the defendant. As the defense of justification is not admissible under the general issue at common law, nor under the general denial where the code system of pleading prevails, it follows that the defendant must, by his plea in justification, show that the whole of the charge made by him against the plaintiff is true. To make a complete defense, the matter alleged in the defendant's plea must in every way correspond with the imputation contained in the declaration: Kerr v. Force, 3 Cranch C. C. 8, Fed. Cas. No. 7730. "There is no better settled point in slander than this: the plea must justify the same words contained in the declaration, or, at least, so many of them as are actionable. It is not enough to justify the sentiment contained in the words": Skinner v. Grant, 12 Vt. 456. "It is a well-established rule that the plea of justification should fully meet the declaration in every substantial particular. Great certainty of averment is requisite. It must justify the substance of the publication, its character and imputations, and also the sense in which the innuendos explain it, if they do so fairly. If the plea does not aver that the words are true, in the sense imputed to them in the complaint by proper innuendo, it is bad. It must be as broad as the charge, and must specify the charge claimed to be libelous": Jones v. Townsend, 21 Fla. 431, 58 Am. Rep. 676. The justification must go to the whole of the charge of which the defendant wishes to undertake to prove the truth, or, in other words, it must be as broad as the libel and answer every material part of the declaration: Thrall v. Smiley, 9 Cal. 529; Trebby v. Transcript P. Co., 74 Minn. 84, 73 Am. St. Rep. 330, 76 N. W. 961; Holton v. Muzzy, 30 Vt. 365; Smith v. Tribune Co., 4 Biss. 477, Fed. Cas. No. 13,118. "That a plea in bar must answer that portion of the declaration which it professes to answer is a rule not controverted. The rules of pleading, in a case of libel or slander, require that the plea of justification must contain a specific charge set forth with

certainty and particularity, and that the plea must be as extensive as the imputation complained of in the declaration. In order to determine what is the extent of the imputation, we must look at the whole language which the plea professes to justify. If a plea justify everything that is essential, it will be a good answer; but if it justify that part of the alleged libelous matter which is comparatively unessential, leaving out that part which gives a sting to the whole, it must certainly be adjudged bad": *Ames v. Hazard*, 6 B. L. 335.

c. Justifying by Pleading Different or Lesser Crimes or Acts.—

It follows from what we have just stated, if the defamatory matter amounts to a charge of several distinct crimes or discreditable acts, the justification, to be complete, must allege the truth of all of them, and cannot be made out by proving a crime or act different from, and having some, but not all, of the substantial elements of the crime or act alleged. If the libelous charge implies that the plaintiff sold Chinese pork and lard containing the germs of disease, defendant cannot justify by showing that plaintiff bought pork and lard of Chinese, and afterward sold them, and that Chinamen often sold diseased meat: *Mowry v. Raabe*, 89 Cal. 606, 27 Pac. 127. A charge of adultery with C. cannot be justified by the plea of adultery with B.: *Ricket v. Stanley*, 6 Blackf. 169; *Buckner v. Spaulding*, 127 Ind. 229, 26 N. E. 792. A charge that a teacher took indecent liberties with his pupils is not justified by a plea or proof that he was of a grossly immoral character and in the habit of keeping intoxicating liquors in school: *Thibault v. Sessions*, 101 Mich. 279, 59 N. W. 624; nor a charge of being a thief by proof that the plaintiff was guilty of cheating, fraud, or false pretenses: *Youngs v. Adams*, 113 Mich. 199, 71 N. W. 585; nor a charge that the plaintiff "has no moral character," by a plea that he, being the agent of a company to sell certain articles, collect the money therefor, and return it to the company, had received such articles and had not returned them: *Coffin v. Brown*, 94 Md. 190, 89 Am. St. Rep. 422, 50 Atl. 567; nor a charge of committing crime against nature with a mare, that the plaintiff had committed such crime with a cow: *Andrews v. Vanduzer*, 11 Johns. 38; nor a charge that the plaintiff was indicted for fraud, by a plea that he had been indicted and arrested for conspiracy to cheat and defraud: *Loveland v. Hosmer*, 8 How. Pr. 215; nor a charge of illegally selling intoxicating liquors, by a plea that he had sold such articles to certain specified persons without any allegation that the sales were in any respect contrary to law: *Holton v. Muzzy*, 30 Vt. 365; nor a charge that a plaintiff is a scoundrel and knave, not fitted to be trusted with a half million of money, by a plea that he falsified the books of his office, and coerced his clerks to subscribe for, and support, a newspaper of which he was the publisher: *Cook v. Tribune Assn.*, 5 Blatchf. 352, Fed. Cas. No. 3165.

In one case it was determined that the charge of being a thief, though made with respect to a particular transaction, could be

justified by evidence that the plaintiff had been guilty of larceny in another transaction: *Quaid v. Tipton*, 21 Tex. Civ. App. 131, 51 S. W. 264; but if this decision can be sustained, it must be upon the ground that the charge made was general, and not restricted to any particular transaction, for nothing is clearer than that a charge imputing one crime cannot be justified by pleading another, though of the same general character: *Richardson v. Roberts*, 23 Ga. 215; *Beggarly v. Craft*, 31 Ga. 309, 76 Am. Dec. 687; *Downs v. Hawley*, 112 Mass. 237; *Watters v. Smoot*, 11 Ired. 315; *Burford v. Wible*, 32 Pa. St. 95; *Dillard v. Collins*, 25 Grat. 343. The case of *McLeod v. Crosby* (Mich.), 87 N. W. 883, is, therefore, probably not in accord with the weight of authority, for by it a charge of stealing property was held to be justified by a plea of its embezzlement, on the ground that "embezzlement includes the elements of statutory larceny."

d. **The Plea Must not be Conditional or Contingent.**—If the defamatory matter charged plaintiff with being guilty of a crime, the justification must state of what crime he was guilty. If the charge is of perjury, it cannot be justified by pleading that the plaintiff in two actions gave contradictory testimony respecting a certain material fact, and that he hence committed perjury in the one case or the other: *Mull v. McKnight*, 67 Ind. 535; nor can a plea in justification be good, if it merely states that if the plaintiff prove certain specified things, then the defendant will prove, in justification, certain matters disclosed by his answer: *Lewis v. Kendall*, 6 How. Pr. 59.

e. **Must Respond to the Innuendo.**—The plea must justify the charge in the sense in which it was made and intended. It is not sufficient that the plea justify the words used in their literal sense; it must have been understood in a different sense, or as implying some charge in addition to that expressed in the libelous publication. Thus, a publication to the effect that the plaintiff has been jailed on the charge of horse stealing implies that he was guilty of that offense, or, at least, that he has been regularly and properly imprisoned or placed under arrest for that crime, and it is not a sufficient justification merely to say that he was charged with the offense, and jailed on account of the charge, where there is no claim that he was guilty or that he ought to have been jailed: *Downey v. Dillon*, 52 Ind. 442. Hence, if by innuendo, the words are explained or shown to have been used and understood in a particular manner, the plea in justification is not sufficient if it merely avers the truth of the words spoken, without also showing that they were true "in the sense ascribed to them in the declaration": *Jones v. Townsend*, 21 Fla. 431, 58 Am. Rep. 676; *Sanford v. Gaddis*, 13 Ill. 329; *Ricket v. Stanley*, 6 Blackf. 169; *Spooner v. Keeler*, 51 N. Y. 525; *Ames v. Hazard*, 8 R. I. 143; *Dement v. Houston P. Co.*, 14 Tex. Civ. App. 391, 37 S. W. 985; *Mayo v. Blair*, 1 Hayw. & H. 96. "When the charge

is made directly, the plea should aver the truth of the charge as laid in the declaration; but when the charge is made by insinuation and circumlocution, so as to make it necessary to use introductory matter to give point to and show the meaning of the words, the plea should aver the truth of the charge which the declaration alleges was meant to be made. If the words are 'Brittain is as deep in the mud as Welch is in the mire,' and the declaration, with proper introductory matter, alleges that these words were meant to make the charge of passing counterfeit money, the plea should aver that the plaintiff was guilty of passing counterfeit money": *Snow v. Witcher*, 9 Ired. 246. On the other hand, the innuendo may restrict the meaning of the charge or show that it did not impute the offense which would naturally be understood from it, in which event it is sufficient to justify the charge as thus restricted by the innuendo: *Sanford v. Gaddis*, 18 Ill. 329; *Spooner v. Keeler*, 51 N. Y. 527. Of course, the defendant is not bound by the averments of the innuendo. He may deny that his words were used or understood in the sense imputed to them, and justify the words themselves: *Continental Nat. Bank v. Bowdre*, 92 Tenn. 723, 23 S. W. 131. "While a defendant is not bound to justify any forced construction made by way of innuendo upon the language of the publication, he is bound to more than a literal justification; he must justify the substance of the publication, its character, and its imputations, and he must justify in the sense in which the innuendos explain it, if they explain it fairly": *Ames v. Hazard*, 8 R. I. 143; *Royce v. Maloney*, 57 Vt. 325.

f. The Form of the Plea.

1. General Rule.—Naturally, it would seem, especially under the code rules of pleading, to be sufficient to deny that the alleged defamatory matter was false, or to aver, in general terms, that it was true. We have seen, however, that the defense of justification is not admissible under the general issue at the common law, nor the general denial under the code systems. This rule is founded on the assumption that the plea of justification should be affirmative in its character, and should state with fullness and particularity the acts which the defendant imputed to the plaintiff, and which will be sought to be proved against the latter at the trial. To some extent, at least, if the plaintiff has been accused of a criminal act, and the defendant justifies, the former is regarded as if placed on trial for such act and entitled to have the plea and the evidence to be of the same general character as to particularity and conclusiveness as if he were proceeded against by indictment or other authorized accusation of crime. Sometimes the justification is by plea, and sometimes, under the practice prevailing in the particular state, the defendant is permitted to plead the general issue, and thereafter to give notice in writing of special matters intended to be relied upon by him as a defense: *Newell on Slander and Libel*, 2d ed., 600; *Burgwin v. Babcock*, 11 Ill. 28; *Shepard v. Merrill*, 13 Johns. 475. "At

the common law the plea of justification must be pleaded with the greatest precision. It ought to state the charge with the same degree of certainty and precision as is required in an indictment. The object of the plea is to give the plaintiff, who is in truth an accused person, the means of knowing what are the matters alleged against him. It is said that he must know them already; it is true that he knows his own conduct, but he does not know what another means to impute to him. It is because the acts charged against the plaintiff are within the peculiar knowledge of the defendant that he ought to specify them in his plea": Newell on Slander and Libel, 2d ed., 654.

2. When the Charge is Specific in Its Details.—The rule as stated above did not, however, even at the common law, apply, except when the defamatory matter involved a conclusion or inference, and hence the plaintiff could not know from the accusation alone what wrongful acts were thereby imputed to him and were intended to be affirmed by the justification. If the defamatory matter consists of a statement of special facts in detail, and the plea declares in substance that such statement is true, it is sufficient. This is because the charge, as made by the plaintiff's declaration, shows the precise facts of which he has been accused, and the plea affirms the existence of such facts, and the two, taken together, inform the plaintiff as fully as any pleading can of the acts which will be sought to be proved against him: *Swan v. Thompson*, 124 Cal. 193, 56 Pac. 878; *Hauger v. Benua*, 153 Ind. 642, 53 N. E. 942; *Campbell v. Irwin*, 146 Ind. 681, 45 N. E. 810; *Dever v. Clark*, 44 Kan. 745, 25 Pac. 205; *Maretzek v. Cauldwell*, 2 Rob. 715; *Stark v. Knapp & Co.*, 160 Mo. 529, 61 S. W. 669; *Kingsley v. Kingsley*, 79 Hun, 569, 29 N. Y. Supp. 921; *Sweeney v. Baker*, 13 W. Va. 158, 31 Am. Rep. 757. "Where the defamatory matter complained of is in general terms, as that plaintiff is a murderer, thief, or other imputation, which is a mere conclusion or inference of facts, the particular facts relied upon warranting the inference charged must be set forth specifically in a plea of justification, so that the plaintiff may be advised of the matter that he will be called upon to meet. But when the defamatory matter charged is itself specific, it is sufficient to allege generally that the charge is true": *Stark v. Knapp & Co.*, 160 Mo. 529, 61 S. W. 669. This rule was applied when "the substance of the defamatory matter charged was that the plaintiff, as the representative of a corrupt combine of the school board, and the leader of a lobby composed of contractors and go-betweens, who have fattened on the corruption of the present system, and are working for a continuation of fat opportunities, is a malign influence, working at Jefferson City to defeat the civic federation school bill in the senate": *Stark v. Knapp & Co.*, 160 Mo. 529, 61 S. W. 669. Also, when the charge against the plaintiff was that at the time and place specified he purchased and killed a steer that to all appearances would have died of its injuries before night, butchered it, dressed the meat, and took

it to his market, and there offered it for sale to his customers: *Kuhn v. Young*, 78 Tex. 344, 14 S. W. 796. Also, when the charge was, that a little girl lived with plaintiff's family, that they tired of her, and at a time and place specified, told her "to get out and go somewhere—they did not care where—and never come back again," but not to go near sheepherders or they would kill her, and with this fear in her heart, she wandered about on the desert for two days and nights, where she was found by a sheepherder, and begged piteously for her life, thinking she would be killed, and that when found she was in an emaciated condition, having had nothing to eat for about three days, and being almost famished for water: *Fenstermaker v. Tribune P. Co.*, 12 Utah, 439, 43 Pac. 112.

3. When the Charge Involves a Mere Opinion or Conclusion.—On the other hand, if, from the form of the libelous or slanderous charge, the plaintiff or the court may reasonably be in doubt respecting the crime or other wrongful or improper act attributed to him, a plea in justification which merely denies the falseness, or affirms the truth, of the charge is insufficient. It must proceed affirmatively to point out the act of which the plaintiff is claimed to have been guilty: *De Armond v. Armstrong*, 37 Ind. 35; *Wachter v. Quenzer*, 29 N. Y. 547; *Knox v. Commercial Agency*, 40 Hun, 508. If it charges plaintiff generally with having committed a crime, without designating the details, then the justification must allege the existence of facts from which the inference necessarily follows that plaintiff was guilty of such crime, or it must charge the crime in language which would be sufficient in an indictment or other criminal accusation: *Atterbury v. Powell*, 29 Mo. 429, 77 Am. Dec. 579. Hence, if the defamatory words charge plaintiff with being a "beef thief, hog thief, and a sheep thief," a justification stating that the plaintiff had stolen beef, hogs, and sheep is insufficient, because it gives no notice to the plaintiff of the time and place intended to be proved, of the person to whom the beef, hogs, and sheep belonged, nor whether stolen at one time and place, or at different times and places: *Nall v. Hill*, 7 Tenn. (Peck.) 325. So if the charge is that the plaintiff swore to a lie on filing some bills in the chancery court, a justification stating that he lied in swearing to a bill, which is sufficiently described, by stating, among other things, that the estate of John Steele owed no debts, "when the plaintiff knew at the time he took such oath, in swearing to such bill, that said estate was indebted," the specification in the justification is "too vague and uncertain to form an issue upon": *Steele v. Phillips*, 29 Tenn. (10 Humph.) 461. If the charge was that plaintiff, a minister, "had been egged out of his own county, had parted a man and wife, and would have better clothes and appear more decent if he did not spend his time running after so many dirty bitches, and spend his money riding on the train with them," a justification in which the defendant states that these matters were told to him, and are true, is materially defective, because it does not give any particulars of

time, place, or occasion: *Amos v. Stockert*, 47 W. Va. 109, 34 S. E. 821.

4. **Illustrations of Justifications Where Crime has been Charged.**—Where the defamatory matter amounts to a charge that the plaintiff had committed a specific crime, a general averment that the words used were true is ordinarily, as we have seen, not sufficient. The charge may, however, be so specific that a mere averment in the justification that it is true gives plaintiff sufficient notice of what will be sought to be proved against him. Thus, if the charge is, that the plaintiff signed defendant's name to a note without his permission, a plea that the plaintiff did so sign such name, giving the time and place of signing, is good: *Creelman v. Marks*, 7 Blackf. 281.

A charge of being a thief has been the occasion of many prosecutions for libel and slander. If the charge is that the plaintiff stole a specified article or articles, of course there can be no adequate justification which charges him with some other wrong or crime or of stealing some other article: *Eastland v. Caldwell*, 2 Bibb, 21, 4 Am. Dec. 668; *Kent v. Bonzey*, 38 Me. 435; *Gardner v. Self*, 15 Mo. 480; *Hall v. Adkins*, 59 Mo. 144. If the charge is generally that the plaintiff is a thief, or a member of a band of thieves, the justification must do more than aver him to be a thief or a member of a band of thieves, and must proceed to state the specific instances of theft on which the defendant relies: *Anonymous*, 3 How. Pr. 406; *Kansas City S. Co. v. Carlisle*, 108 Fed. 344.

A charge that the plaintiff is a prostitute cannot be justified by pleading that she is guilty of some kindred offense, such as living in the same house with women who are prostitutes: *Swartzel v. Dey*, 3 Kan. 244; nor can the charge of keeping a house of prostitution be justified by the plea that the plaintiff had kept a house in which lewd women were permitted to live: *Eaton v. White*, 2 Pin. 42. A charge of being a prostitute does not of itself allege any specific act. Hence, the averment in the plea of justification that the charge is true does not sufficiently advise plaintiff of the evidence which she must meet. Where the justification averred that the plaintiff "was a person of notorious bad character for chastity, and that the words and declarations as charged in the complaint were true, it was held that the justification was insufficient, because unfair to the plaintiff, and that "defendant should have been held to the allegation and proof of some specific act or acts of whoredom on the part of the plaintiff, in justification," and it was said that "it is necessary, although the libel or slander contain a general imputation upon the plaintiff's character, that the answer should state specific facts, showing in what particular instances, and in what exact manner, he has misconducted himself": *Sunman v. Brewin*, 52 Ind. 140. The application to cases of this character of the rule that specific acts must be alleged in justification

is of doubtful propriety, first, because a specific act of incontinency does not prove general prostitution (*Rutherford v. Paddock*, 180 Mass. 289, ante, p. 282, 62 N. E. 381), and second, because the charge of being a prostitute can rarely be proved otherwise than by evidence of general reputation: *Proctor v. Houghtaling*, 37 Mich. 41.

A charge that the plaintiff is a liar can be justified only by alleging specific facts, and not by a general averment of the truth of the charge: *Jones v. Cecil*, 10 Ark. 592; and a justification of a charge that the plaintiff had been guilty of perjury must be as complete as an indictment for the same offense, and must not omit any essential of the crime: *McGough v. Rhodes*, 12 Ark. 625; *Tilson v. Clark*, 45 Barb. 178. Though a justification sufficiently alleges the taking of the oath, its materiality, and that it was false, it must proceed further and show that it was willfully and corruptly false, for merely swearing to an untruth does not constitute perjury: *Downey v. Dillon*, 52 Ind. 442. Probably an exception to the general rule arises when the charge alleged in the declaration is so specific that its reiteration by the plea of justification sufficiently advises the plaintiff of the testimony to be produced against him, and thereby prevents his being surprised by its production: *Starr v. Harrington*, 1 Ind. 515; *Lewis v. Black*, 27 Miss. 425.

5. **Partial Justification.**—Though it cannot constitute a complete defense, partial justification may and ought to be pleaded whenever defendant wishes to deny the use of some part only of the defamatory words attributed to him or to show that some part only of the defamatory charge made by him is true: *Stacy v. Portland P. Co.*, 68 Me. 279; *Ames v. Hazard*, 6 R. I. 335; *Nott v. Stoddard*, 38 Vt. 25, 38 Am. Dec. 633; *Sweeney v. Baker*, 13 W. Va. 158, 31 Am. Rep. 757. With respect to the part of the defamatory charge which the defendant seeks to justify, there is no doubt that the same rules apply to his pleading as if the justification were of the whole charge, one of which rules is that the "precise charge must be justified, and the whole of the precise charge": *Jones v. Greeley*, 25 Fla. 629, 6 South. 448; *Ames v. Hazard*, 6 R. I. 335. We find the general statement made that the defendant may plead the general issue, and in his notice of special matter to be relied on by him may specify any matter constituting a justification as to any distinct and severable part of the defamatory charge: *Cloidt v. Wallace*, 56 Ill. App. 389. In another case it is said that "although where there are separate and distinct charges in the same libel, it is allowable in the same pleading or notice to plead the general issue as to a part and justify as to the other charges, yet it is essential that the plea or notice shall substantially answer the whole count or ground of action declared on": *Van Derveer v. Sutphen*, 5 Ohio St. 293.

6. **Must Confess the Use of the Defamatory Words Justified.**—It is said that the plea of justification necessarily proceeds upon

the theory that all of the material averments of the complaint are admitted: *Over v. Schiffing*, 102 Ind. 191, 26 N. E. 91. This statement is not altogether correct, for, as we have shown, there may be a partial plea of justification which avers the truth of a separable part of the defamatory charge attributed to the defendant, but which denies that he has been guilty of uttering or publishing the balance, but it is true that the precedents all indicate that in so far as the defendant wishes to justify any part of the defamatory charge made by him, the plea should be by way of confession and avoidance—that is to say, he should confess the use by him of the words which he intends to justify, and then should proceed to aver that they are true: *Davis v. Mathews*, 2 Ohio, 257; *Folsom v. Brawn*, 25 N. H. 115; *Williams v. McKee*, 98 Tenn. 139, 38 S. W. 730. It has generally been assumed that the various codes of procedure have not in this respect changed the rules of pleading: *Anibal v. Hunter*, 6 How. Pr. 255; *Goodman v. Robb*, 41 Hun, 605.

g. *Joining Justification with Inconsistent Pleas.*—As we have just shown, the common-law rule upon the subject was that the plea of justification is in the nature of confession and avoidance, and that the defendant must, therefore, as a part of his plea of justification, admit the defamatory charge attributed to him, or some severable and distinct part thereof. But under the codes and statutes of many of the United States a defendant is conceded the privilege of pleading inconsistent defenses, and the question has, therefore, arisen whether this statutory rule extends to actions of libel and slander. Perhaps it must be conceded that this question is not everywhere free from doubt, for there are several decisions at least assuming that the common-law rule upon the subject remains in force, and, therefore, that a defendant cannot in the same answer assert the apparently contradictory defense that he was not guilty of the defamatory charge, and that it was true: *Atterberry v. Powell*, 29 Mo. 429, 77 Am. Dec. 579; *Anibal v. Hunter*, 6 How. Pr. 255; *Goodman v. Robb*, 41 Hun, 605. He cannot, we think, as we have already shown, plead conditionally or contingently by alleging that he did not make the defamatory charge, but if it should be proved that he did make it, it is true. He may, however, interpose separate and distinct defenses, the effect of one being to put the plaintiff on proof that the defendant made the defamatory charge, and the other being to allow the defendant to prove that such charge was true, as where he interposes a general denial or a plea of not guilty and also a separate plea in justification of the charge, or of some separable part thereof: *Wright v. Lindsay*, 20 Ala. 428; *Corbley v. Wilson*, 71 Ill. 209, 22 Am. Rep. 98; *Kinyon v. Palmer*, 18 Iowa, 377; *Weston v. Lumley*, 33 Ind. 486; *Payson v. Macomber*, 3 Allen, 69; *Pallet v. Sargent*, 36 N. H. 496; *Stiles v. Comstock*, 9 How. Pr. 48; *Hollenbeck v. Clow*, 9 How. Pr. 289; *Buhler v. Wentworth*, 17 Barb. 649; *Kingsley v. Kingsley*, 79 Hun, 571, 29 N. Y. Supp. 921; *Smith v. Smith*, 39 Pa. St. 441; *Peters v. Ulmer*, 74 Pa. St.

402; *Upton v. Hume*, 24 Or. 420, 41 Am. St. Rep. 863, 33 Pac. 810; *Young v. Kuhn*, 71 Tex. 645, 9 S. W. 860; *Kelly v. Craig*, 9 Humph. 215; *Murphy v. Carter*, 1 Utah, 17.

h. *Effect of in Aggravating Damages or as Evidence of Malice.* There is peril to the defendant in his plea of justification. It is, to a certain extent, a repetition of the slander or libel, and at all events, unless sustained, may be considered by the jury as aggravating damages: *Robinson v. Drummond*, 24 Ala. 174; *Pool v. Devers*, 30 Ala. 672; *Richardson v. Roberts*, 23 Ga. 215; *Downing v. Brown*, 3 Colo. 571; *Fero v. Ruscoe*, 4 N. Y. 162; *Shartle v. Hutchinson*, 3 Or. 337; *Updegrove v. Zimmerman*, 13 Pa. St. 619; *Burckhalter v. Coward*, 16 S. C. 435; *Finch v. Finch*, 21 S. C. 342; because it is evidence of actual or expressed and continued malice: *Jackson v. Stetson*, 15 Mass 48; *Doss v. Jones*, 5 How. (Miss.) 158; *Gorman v. Sutton*, 32 Pa. St. 247; *Wilson v. Nations*, 5 Yerg. 211; *Vliet v. Rowe*, 1 Pinn. (Wis.) 413. The jury cannot be required to give any conclusive or special effect to it. It must be regarded as a matter of evidence and considered in connection with the other evidence properly submitted, for the purpose of considering whether the defendant was actuated by malice and in determining the amount of damages which they should award against him. In many of the states the common law has been much modified. Thus, in California, speaking of a justification not sustained by the evidence, the court said: "If the defendant willfully alleged the existence of such pretended facts, not believing or having no reason to believe them to be true, this might properly be considered by the jury as showing a continuing and express malice. The defendant in an action of slander cannot abuse his privilege of pleading any appropriate matter as a bar, or in mitigation of damages, by spreading on the record a renewed, wanton, and malicious assault upon the reputation of his adversary": *Chamberlin v. Vance*, 51 Cal. 75. In Connecticut "the rule seems to be this: If the defendant maliciously and for the purpose of spreading and perpetuating a slander pleads the truth of the words in justification, and fails to prove it, it may be regarded as evidence proving, or tending to prove, malice in speaking the words originally; and might tend indirectly to increase the damages for speaking the slanderous words charged in the declaration by showing the degree of malice in speaking them. It is a circumstance to be considered in estimating damages for the cause of action alleged in the declaration and proved, though it is not of itself a cause for which damages may be directly assessed in that suit": *Ward v. Dick*, 47 Conn. 300, 36 Am. Rep. 75. In Georgia "the necessary legal effect of every strict plea of justification in actions of slander not involving privileged communications is to reaffirm the charge or charges justified, and aver the truth of the words spoken if they impute a crime punishable in law. Such reaffirmation may or may not be an aggravation of the original slander. Whether it is so or not is to be determined

by the jury. Where the plea is filed in good faith and under an honest expectation of being able to establish the alleged justification, the jury should consider it warranted, and add nothing to the damages on account of it, although the proof should fall short of establishing it. On the other hand, if they should believe it unwarranted and unfounded, they ought to treat it as an aggravation and as cause for augmenting the damages": *Henderson v. Fox*, 83 Ga. 233, 9 S. E. 839. In Illinois, "where a plea of justification is filed without an honest belief that it can be sustained, it only aggravates the slander—it is a new publication of a defamation, and should, therefore, aggravate the damages. On the contrary, however, if the plea is filed in good faith, it should never produce that result. And to determine that question the jury should consider all of the circumstances under which the plea was filed": *Freeman v. Tinsley*, 50 Ill. 497; *Hawver v. Hawver*, 78 Ill. 412. In this state a trial court instructed a jury that the defense of justification, when not sustained by the evidence, was an odious one. This was held to be erroneous, the appellate court saying: "Our statute confers upon every defendant to an action the right to plead as many matters of fact in several pleas as he may deem necessary for his defense. This is always the law in this state. Being a right secured by law, it cannot be odious to interpose a plea of justification if it is not sustained. Such is not the law. So instructing the jury could not but have influenced them against the defendant": *Corbley v. Wilson*, 71 Ill. 209, 22 Am. Rep. 98. In Indiana, where a plea of justification was interposed and some evidence given to support it, an instruction was thereupon given that if the defendant had failed to prove that his plea was true, this was a great aggravation of the slander, and that the jury should take it into consideration in assessing damages against the defendant, the appellate court declared the instruction to be erroneous, saying that it did not necessarily follow that justification not fully proved should aggravate the damages, that though the plea was not entirely proved, yet if the evidence under it showed that the defendant had reason to believe from the plaintiff's conduct that the charge was true, then the damage could not be increased in consequence of the plea: *Byrket v. Monohon*, 7 Blackf. 83, 41 Am. Dec. 212; *Shank v. Case*, 1 Ind. 170. Later, in the same state, the general position was taken and maintained that, as the statute authorized defendant to file as many pleas as he thought proper, what he said in one plea ought to have no operation against him on the trial of an issue on any other plea; that each plea should stand entirely independent of the others; and that an issue of fact in any one of the pleas should be tried and the damages assessed in the same manner in which they would have been had there been no other plea: *Murphy v. Stout*, 1 Ind. 372; *Swails v. Butcher*, 2 Ind. 84. In Iowa, under a statute declaring that in actions of slander and libel the defendant might in his answer allege both the truth of

the matter charged as defamatory and any mitigating circumstances sufficient in law to reduce the amount of the damage, or might allege either one of them without the other, and that the allegation of the truth of the matter charged should not, if he fail to establish it, be determined in itself proof of the malice of such words, but that the jury should decide upon the whole case whether such defense was or was not made with malicious intent, and whether he proved the justification or not, he might give in evidence the mitigating circumstances, but that each defense must be separately stated and numbered, the court held that the failure to sustain a justification would not of itself be deemed proof of malice: *Kinyon v. Palmer*, 18 Iowa, 377. So under the statute of Michigan "the mere failure to prove a justification is not sufficient to create an inference of malice from the plea or notice. If there is actual good faith in attempting to prove the justification and the testimony fairly tends to prove the charge, the defendant is not now held culpable for the attempt, though it fails. But no one can be justified in repeating a slander unless upon such evidence as legitimately tends to establish its truth, although it may be rebutted or fall short of absolute certainty. And if the justification is in fact only colorable, and the testimony is only introduced for the purpose of casting suspicions which it has no tendency to confirm, and which could not establish the defense under color of which it is introduced, such a course would not be deserving of favor and might in some cases be found malicious": *Proctor v. Houghtaling*, 37 Mich. 41. In New Hampshire, "if the defendant, under color of a justification, seeks to repeat or perpetuate his slander, it is evidence of malice which the jury may consider against him, but if he believed when he spoke the words that they were true, and makes a bona fide defense to the action under a plea of justification, we do not see why he should make it under the penalty of being punished by increased damages if he should fail to satisfy the jury of the fact any more than in another case where a defendant does not succeed in a bona fide defense. We think it should be left to the jury to decide from the weight and character of the evidence introduced in support of the plea and the manner and spirit in which the defense is conducted, whether the real object of the plea in evidence was to defend the action with a reasonable expectation of success, or to repeat the original slander. This, we think, is the true rule, and under it the defendant cannot be embarrassed in making a fair and honest defense to the action under a plea justifying the words and offering competent evidence in mitigation of damages under the general issue": *Pallet v. Sargent*, 36 N. H. 496. In New York there is no doubt that in all cases in which justification is pleaded and there is no attempt to prove it, that this cannot be regarded as showing malice conclusively, but it is in every case proper to be considered by the jury, and will justify them in reaching the conclusion that the defendant was actuated by malice: *Klinek v. Colby*,

46 N. Y. 427, 7 Am. Rep. 360; *Distin v. Rose*, 69 N. Y. 122; *Marx v. Press Pub. Co.*, 134 N. Y. 501, 31 N. E. 918. If the defendant fails to establish the justification set up in his answer, the jury may determine whether it was set up in good or bad faith, and if they find it was set up in bad faith, they may take it into consideration in estimating the damages to be awarded by them: *Holmes v. Jones*, 121 N. Y. 461, 24 N. E. 701. In Ohio, views expressed by the supreme court of Illinois have been considered and the following rule formulated: "When, therefore, in an action of slander the truth of the words spoken is pleaded in good faith and under an honest belief in their truth and with reasonable ground for such belief, the plaintiff is not, by reason of such plea or the failure of proof of truth, entitled to exemplary damages; nor should it be regarded as an aggravation beyond the real injury sustained by the plaintiff. The motive with which the justification was pleaded is for the consideration of the jury. If they find that it was done with intention to injure the plaintiff, they may rightfully consider it in aggravation of damages; but where no wrongful intention is found, there is no just ground for the punishment of the defendant: *Rayner v. Kinney*, 14 Ohio St. 283. A trial court in Oregon having instructed that if the plea of the truth of the charge in justification is not sustained by the evidence, "the jury may consider that as a repetition and republication of the original charge, and consider the same in aggravation in assessing damages and as evidence of malice on the part of the defendant against the plaintiff," such instruction was regarded as reversible error under section 91 of the code of that state, declaring that the defendant might in his answer allege the truth of the matter charged, and any mitigating circumstances to reduce the damages, and whether he prove the justification or not, might give in evidence the mitigating circumstances, the appellate court saying: "It will depend upon the motive with which the plea was interposed and the good faith of the defendant. If, under the color of justification, the defendant seeks to reiterate and perpetuate his slander, it may be considered by the jury as evidence of malice and in aggravation of damages; but where the plea is made in good faith, and all that can be said is that he has failed to fully support it by competent proof, we do not see the justice of applying a rule to him not applicable to other litigants who happen to fail in a bona fide defense": *Upton v. Hume*, 24 Or. 420, 41 Am. St. Rep. 863, 33 Pac. 810. In Texas where the statute authorizes a defendant to interpose as many defenses as to him may seem necessary and which are pertinent to the cause, it is held that there can be no qualification of his right by holding his unsustained plea of justification to be evidence of malice: *Express P. Co. v. Copeland*, 64 Tex. 354; and it is, therefore, not admissible on the trial of the cause for that purpose: *Young v. Kuhn*, 71 Tex. 645, 9 S. W. 860.

1. **Withdrawal of the Plea.**—After the defendant has closed his case offering no evidence in support of the plea of justification, it is said to be too late for him to withdraw it, and the plaintiff has the right to have it considered by the jury in aggravation of damages: *Lea v. Robertson*, 1 Stew. 138; and a like result must follow, though the plea is withdrawn by the consent of the court, if it was not withdrawn until after the plaintiff has closed his case and the notice of the plea of justification had been read to the jury: *Beasley v. Meigs*, 16 Ill. 139. In Illinois, it has been held that the defendant, when the case was called for trial, has an absolute right to withdraw his plea of justification, and that it is error in the court to deny the exercise of such right, that the case did not call for any determination of the question as to whether the withdrawal of the plea by the defendant, had it been permitted, would have wholly relieved him from the consequences of having interposed it: *Fitzgerald v. Furgeson*, 25 Ill. 138. In California, it has been decided that if the defendant, by permission of the court, withdraws his plea and files an answer omitting all the objectionable matter, that the plaintiff cannot thereafter show that such justification had been pleaded and relied upon at the former trial: *Morris v. Lachman*, 68 Cal. 109, 8 Pac. 799. Under the practise in Tennessee the defense interposes what is called a short plea, consisting merely of the word "justification." This plea should be treated as a nullity and disregarded, and if it is withdrawn formally, it is improper for the court, because of any subsequently occurring event, to permit it to be read to the jury for the purpose of aggravating damages: *Shirley v. Keathy*, 4 Cold. 29.

VI. Evidence of Justification.

a. **Burden of Proof.**—It is an undoubted rule that the plaintiff need only show the utterance or publication by defendant of the defamatory matter attributed to him. It will be presumed *prima facie* not to be true, and the plaintiff is, therefore, under no obligation to offer any evidence of its falseness. Whenever justification is pleaded, the burden of proof is upon the defendant, and he is, therefore, if this is the only issue presented by the pleadings, placed with respect to him in the attitude of a plaintiff or affirmer, and is entitled to the opening and closing: *Ransome v. Christian*, 56 Ga. 351; *Tull v. David*, 27 Ind. 377; *Heilman v. Shanklin*, 60 Ind. 424; *Stith v. Fullinwider*, 40 Kan. 73, 19 Pac. 314; *Finley v. Widner*, 112 Mich. 230, 70 N. W. 433; *Nelson v. Wallace*, 48 Mo. App. 193; *Clark v. Bohms* (Tex. Civ. App.), 37 S. W. 347.

b. The Degree or Amount of Proof Required.

1. **In Civil Cases.**—If a defamatory charge does not impute to the plaintiff the commission of a crime, we apprehend that there is nowhere any doubt that the defendant can sustain his plea of justification by producing a preponderance of evidence in his favor. In the majority of the cases, however, the defamatory charge does

impute to the plaintiff the commission of a crime, and under a plea of justification he is in a certain sense placed on trial for the crime, and the sustaining of the plea, while it cannot expose him to punishment, must be nearly as derogatory to his reputation as if he had been prosecuted and found guilty of the crime charged against him. In a criminal prosecution he would be entitled to an instruction to the jury to find him not guilty unless, from the evidence, they were satisfied of his guilt beyond a reasonable doubt. There are many decisions holding such to be the rule in a civil action. Upon this subject the decisions in the different states are by no means harmonious, and there would be no difficulty, in some instances, in showing a like want of harmony between the courts of final resort in the same state. The following affirm that the defendant must either produce a record of the plaintiff's conviction of the crime imputed to him, or must introduce competent evidence from which the jury are satisfied of the plaintiff's guilt beyond a reasonable doubt: *Williams v. Gunnels*, 66 Ga. 521; *Crotty v. Morrissey*, 40 Ill. App. 477; *Corbley v. Wilson*, 71 Ill. 209, 22 Am. Rep. 98; *Wonderly v. Nokes*, 8 Blackf. 589; *Hutts v. Hutts*, 62 Ind. 214; *Fowler v. Wallace*, 131 Ind. 347, 31 N. E. 53; *Wintrobe v. Renbarger*, 150 Ind. 556, 50 N. E. 570; *Fountain v. West*, 23 Iowa, 9, 92 Am. Dec. 405; *Ellis v. Lindley*, 38 Iowa, 461; *Polston v. Lee*, 54 Mo. 291; *Burckhalter v. Coward*, 16 S. C. 435. The decisions in Georgia, Iowa, and Missouri to this effect have, however, been overruled by the later cases: *Atlanta Journal v. Mayson*, 92 Ga. 640, 44 Am. St. Rep. 104, 18 S. E. 1010; *Riley v. Norton*, 65 Iowa, 306, 21 N. W. 649; *Edwards v. Knapp*, 97 Mo. 432, 10 S. W. 54; and statutes enacted at a comparatively recent day have, in Illinois and Indiana, adopted the rule generally recognized in other states: *Tunnell v. Ferguson*, 17 Ill. App. 76; *Wintrobe v. Renbarger*, 150 Ind. 556, 50 N. E. 570; which is, that in a civil action for libel or slander, though the defamatory charge imputes to the plaintiff the commission of a crime, irrespective of its dignity, it is sufficient for the defendant to satisfy the jury by a preponderance of the evidence of the truth of his justification. He need not in any case prove the guilt of the plaintiff beyond a reasonable doubt: *Spruil v. Cooper*, 16 Ala. 791; *Hearne v. De Young*, 119 Cal. 670, 52 Pac. 150, 499, 958; *Downing v. Brown*, 3 Colo. 571; *Anderson v. Savannah P. Co.*, 100 Ga. 454, 28 S. E. 216; *Tunnell v. Ferguson*, 17 Ill. App. 76; *Riley v. Norton*, 65 Iowa, 306, 21 N. W. 649; *Sloan v. Gilbert*, 75 Ky. 51, 23 Am. Rep. 708; *Ellis v. Bunzell*, 60 Me. 209, 11 Am. Rep. 204; *McBee v. Fulton*, 47 Md. 403, 28 Am. Rep. 465; *Peoples v. Evening News*, 51 Mich. 11, 16 N. W. 185, 691; *Owen v. Dewey*, 107 Mich. 67, 65 N. W. 8; *Edwards v. Knapp*, 97 Mo. 432, 10 S. W. 54; *Folsom v. Brawn*, 25 N. H. 114; *Kincade v. Bradshaw*, 10 N. C. 63; *Barfield v. Britt*, 47 N. C. 41, 62 Am. Dec. 190; *Bell v. McGinness*, 40 Ohio St. 204, 48 Am. Rep. 673; *McClagherty v. Cooper*,

39 W. Va. 313, 19 S. E. 415; *Kidd v. Fleek*, 47 Wis. 443, 2 N. W. 1121.

A further question may arise concerning the character, rather than the amount, of the evidence. Thus, with respect to certain crimes, the law may require on the trial of a criminal prosecution not merely that the jury be satisfied of the defendant's guilt beyond a reasonable doubt, but, further, that the evidence against him be of a specified character, as, for instance, in a prosecution for perjury, that the guilt of the defendant be established by the testimony of two or more witnesses, or in other prosecutions that the guilt of the defendant be not established by the uncorroborated testimony of an accomplice. When the defamatory charge was that the plaintiff had been guilty of perjury, it was several times held that the defendant could not sustain the justification except by producing the record of the plaintiff's conviction of that crime, or by proving his guilt by two witnesses, or by one witness, and the same corroborating circumstances as would have been necessary to sustain his conviction in a criminal prosecution: *Ransome v. Christian*, 56 Ga. 351; *Byrpet v. Monohon*, 7 Blackf. 83, 41 Am. Dec. 212; *Bradley v. Kennedy*, 2 G. Greene, 231; *Newbit v. Statuck*, 35 Me. 315, 58 Am. Dec. 706; *Woodbeck v. Keller*, 6 Cow. 118; *Hopkins v. Smith*, 3 Barb. 599; *Steinman v. McWilliams*, 6 Pa. St. 170; *Gorman v. Sutton*, 32 Pa. St. 247; *Coulter v. Stuart*, 2 Yerg. 225. The force of these decisions is much impaired by the fact that most of them were pronounced at a comparatively early day and by courts which were inclined to regard the defendant as bound to sustain his plea by the same amount, as well as by the same character, of evidence as was required to sustain a conviction for the same crime.

2. In Criminal Prosecutions the defendant is entitled to the benefit of every reasonable doubt arising upon the evidence. In other words, he is not to be convicted if the jury, from all the evidence, entertain a reasonable doubt of his guilt. This rule is applicable to criminal prosecutions for slander or libel. If the jury, after hearing all the evidence offered, are not satisfied beyond a reasonable doubt that the prosecuting witness was innocent of the crime attributed to him, then it follows that they are not satisfied that the defendant has been guilty of slandering or libeling such prosecutor, and should return a verdict of not guilty: *McArthur v. State*, 59 Ark. 431, 27 S. W. 628; *State v. Bush*, 122 Ind. 42, 23 N. E. 677; *State v. Wait*, 44 Kan. 310, 24 Pac. 354; *Manning v. State*, 37 Tex. Cr. Rep. 180, 39 S. W. 118.

c. Evidence Admissible and Necessary to Justify a Charge of Crime.—We shall not here enter upon the consideration of the evidence necessary to prove the different crimes respecting which an issue may be formed by the plea of justification. As to the character of the evidence, it is manifest that it must be the same as would be competent in a criminal prosecution. It cannot consist of

hearsay or evidence of general repute, where such evidence could not properly be received in criminal prosecutions: *State v. Butman*, 15 La. Ann. 166; *Commonwealth v. Snelling*, 15 Pick. 337; *People v. Jackman*, 96 Mich. 269, 55 N. W. 809; *State v. White*, 29 N. C. (7 Ired.) 180.

The plea of justification is not sustained unless the evidence tends to prove every element essential to the existence of the crime imputed to the plaintiff: *Weller v. Butler*, 15 Ill. App. 209; *Seeley v. Blair*, Wright, 683. It is not sufficient that the evidence establishes the existence of suspicious circumstances or of some one of several elements, which together make up the crime charged: *Peterson v. Murray*, 13 Ind. App. 420, 41 N. E. 836; *Sheehy v. Cokley*, 43 Iowa, 183, 22 Am. Rep. 236; *Mielenz v. Quasdorf*, 68 Iowa, 726, 28 N. W. 41; *Murphy v. Olberding*, 107 Iowa, 547, 78 N. W. 205; *Smith v. Wyman*, 16 Me. 14. If the crime charged is perjury, it is not sufficient to prove that the plaintiff testified and that his testimony was untrue, but the defendant must go further and show all the additional elements which would be required to sustain a conviction, as that the testimony was also material to the issue and was corruptly and willfully false and was given under all the circumstances required to warrant a conviction for perjury: *McGlemery v. Keller*, 3 Blackf. 488; *Tull v. David*, 27 Ind. 377; *Sloan v. Gilbert*, 12 Bush, 51, 23 Am. Rep. 708; *Wood v. Southwick*, 97 Mass. 354; *McKinly v. Rob*, 20 Johns. 351; *Hopkins v. Smith*, 3 Barb. 599; *Jenkins v. Cockerham*, 23 N. C. 309; *Chandler v. Robinson*, 29 N. C. 480; *McClaghery v. Cooper*, 39 W. Va. 313, 19 S. E. 415.

HUNTINGTON v. SHUTE.

[180 Mass. 371, 62 N. E. 380.]

NEGOTIABLE INSTRUMENTS—Burden of Proof as to Consideration.—In an action upon a promissory note the burden of proof is upon the plaintiff to establish that it was given for a valuable consideration, though it purports to be for value received. While the production of the instrument with proof or admission of its execution makes a prima facie case, yet if the defendant puts in evidence a want of consideration, the burden of proof remains with the plaintiff, who must satisfy the jury, by a fair preponderance of the evidence, of the existence of a valuable consideration. (p. 310.)

Action on a promissory note, of which the following is a copy:
"\$750.00 Boston, Mass., April 21, 1898.

"One year from date, on demand, we promise to pay to the

order of Eliza P. Huntington seven hundred and fifty dollars. Value received. Interest at $3\frac{1}{2}$ per cent per annum.

"CHARLES S. SHUTE.

"ROSETTA E. SHUTE."

The defense of want of consideration having been made, the trial court instructed the jury that the words "for value received," appearing in the note, were equivalent to an admission on the part of the defendants that they had received full value, and required them to assume the burden of proof to show that there was no consideration. Verdict for the plaintiff, and the defendant alleged exceptions.

E. B. Powers and D. L. Smith, for the defendants.

J. W. Titus. for the plaintiff.

372 LATHROP, J. The rule is well settled in this commonwealth that, in an action on a promissory note, the burden of proof is upon the plaintiff to establish the fact that it is given for a valuable consideration. While the production of the note, with the admission or proof of the signature, makes a prima facie case, yet if the defendant puts in evidence of a want of consideration, the burden of proof does not shift, but remains upon the plaintiff, who must satisfy the jury, by a fair preponderance of the evidence, that the note was for a valid consideration: *Morris v. Bowman*, 12 Gray, 467; *Estabrook v. Boyle*, 1 Allen, 412; *Smith v. Edgeworth*, 3 Allen, 233; *Perley v. Perley*, 144 Mass. 104.

It does not appear from the reports of these cases whether the note declared on in each contained the words "value received." These words, however, were in the note in suit in the case of *Delano v. Bartlett*, 6 Cush. 364, but the case was decided on the general rule: See, also, *Noxon v. De Wolf*, 10 Gray, 343, 346; *Simpson v. Davis*, 119 Mass. 269, 20 Am. Rep. 324.

We can see no reason for changing the rule so well established, merely because the note contains the words "value received."

Exceptions sustained.

The Burden of Showing a Want of a Consideration for a promissory note is ordinarily upon the defendant. When the execution and delivery of the note are admitted, the presumption is that it is founded upon a sufficient consideration: *Carnwright v. Gray*, 127 N. Y. 92, 24 Am. St. Rep. 424, 27 N. E. 835; *Perot v. Cooper*, 17 Colo. 80, 31 Am. St. Rep. 258, 28 Pac. 391.

COMMONWEALTH v. GOLDSTEIN.

[180 Mass. 374, 62 N. E. 378.]

PRACTISE—Mode of Objecting to the Line of Argument of Counsel.—If, on the trial of a person accused of a crime, the prosecuting attorney relies upon a fact from which the defendant's attorney claims that no inference can be drawn against him, the proper practise is for him to ask the court to rule that such fact is not evidence, and cannot be used against the accused for any purpose on the trial, and if such ruling be refused, to except. (p. 312.)

CRIMINAL TRIALS.—The fact that the accused, though not represented by an attorney, offered no testimony at the preliminary examination, is admissible at his trial, especially where his defense is an alibi. What conclusion shall be drawn from such evidence is for the jury to determine. (pp. 311, 312.)

T. E. Grover, for the defendant.

R. H. O. Schulz, assistant district attorney, for the commonwealth.

³⁷⁴ **HOLMES, C. J.** The defendant was complained of in the district court for breaking and entering a building in the night with intent to commit larceny and committing larceny therein. He pleaded not guilty, but offered no evidence, and was ordered to recognize for appearance in the superior court. At this time ³⁷⁵ he was without counsel. At the trial in the superior court he endeavored to prove an alibi, but was convicted. In arguing the case the assistant district attorney commented on the fact that the evidence had not been offered below. The counsel for the defendant asked the judge to stop this line of argument and excepted to his refusal to interfere, and afterward asked for a ruling that the defendant's making no defense in the district court was not evidence against him and could not be used for any purpose at this trial. This ruling was refused and the defendant excepted again. By this request and exception the defendant saved his rights: *O'Driscoll v. Lynn etc. R. Co.*, 180 Mass. 187, 62 N. E. 3.

It is argued that the offense was a felony not within the jurisdiction of the district court to punish (Pub. Stats., c. 203, sec. 12; Pub. Stats., c. 210, sec. 1; Stats. 1893, c. 396, sec. 34), that the proceedings in that court were merely to determine whether the defendant should be bound over to answer in the superior court, and that not only was any unfavorable conclusion from the defendant's conduct unwarranted, but it is putting a pressure upon a prisoner from which he should be free,

if his failure to produce his evidence upon such proceedings can be turned against him: *Templeton v. People*, 27 Mich. 501.

We certainly should be slow to lay down any general proposition concerning the conclusion to be drawn from silence in the district court. If due to strategic considerations, which in this case it was less likely to be than if the defendant had had counsel, we should hesitate to say that it tended to show a bad case. Similar conduct in civil causes is familiar. It has been held that a waiver of examination, although it has the same effect as a finding by a magistrate of probable cause to believe the defendant guilty (*State v. Cobb*, 71 Me. 198), is not such an admission of probable cause as to preclude a subsequent action for malicious prosecution: *Schoonover v. Myers*, 28 Ill. 308; *Hess v. Oregon Baking Co.*, 31 Or. 503, 49 Pac. 803. And to this we quite agree. Nevertheless, however uncertain the inference from the conduct of an accused party may be with regard to his innocence or guilt, such conduct generally is admissible in evidence, and what conclusions shall be drawn from it generally is left to the jury to decide.

376 Probably more circumstances were before the jury than appear in the exceptions; but even the exceptions do not leave the question in the naked form whether a failure to put in evidence under the Public Statutes, chapter 212, section 30, warrants an unfavorable inference on the trial above. The character of the defense is to be noticed. It certainly might be thought likely that if a plain man, unadvised, were charged with such a crime, and knew that several persons could prove that he was at home at the time, he would say so and would make some effort to produce them. Whatever the nature of the proceedings, they give the defendant an opportunity to get rid of further trouble, and the defense is so untechnical, so obvious, and, if the witnesses are believed, so conclusive, that a jury fairly might think that it would be natural to set it up at the first chance. So far as the legitimacy of an unfavorable inference is concerned, if the jury should draw it on all their impressions of the case, we cannot say that it would be unwarranted.

As to the undue pressure on the prisoner, it does not seem to us a good reason for freeing him from the effect of any legitimate and natural inference against him that he can make a more effective defense if he has a chance to catch the government by surprise. It is not to be supposed that knowing what he has to meet will lead a prosecuting officer to do more than investigate and try to present the truth. A defendant has no

general immunity from comment on his mode of conducting his defense in a criminal case. If new evidence should be produced at a second trial which might have been produced before, there is no doubt that it would be open to the criticism and argument objected to in this case. So, the failure to produce a witness who had testified at the first trial (*Commonwealth v. Haskell*, 140 Mass. 128), or to offer evidence in explanation or contradiction of circumstances tending to prove guilt, when such evidence, if it existed, would be at the prisoner's command: *Commonwealth v. Webster*, 5 Cush. 295, 316, 52 Am. Dec. 711; *Commonwealth v. Clark*, 14 Gray, 367, 373; *Commonwealth v. Costley*, 118 Mass. 1, 27.

The ground on which *Templeton v. People*, 27 Mich. 501, is put is that the statute expressly gives the prisoner an election to make or not to make a defense, and, therefore, impliedly prohibits ³⁷⁷ an unfavorable inference from his choice. We find no such provisions in our laws. It is beyond our province to examine where it was found in the statutes of Michigan: See *Tweedle v. State*, 29 Tex. App. 586, 591, 16 S. W. 544.

. Exceptions overruled.

In *O'Driscoll v. Lynn etc. R. R. Co.*, 180 Mass. 187, 62 N. E. 3, referred to in the principal case, it appeared that the plaintiff's counsel objected to a line of argument made by the defendant's attorney, on the ground that it was not warranted by a certain paper admitted in evidence, and that such paper was not evidence of any fact upon which such argument was based, but "the argument was allowed to stand, and the plaintiff alleged exceptions." The appellate court held that this was not sufficient to present any question for its consideration, that it was not the duty of the courts to confine arguments to the line of view destined ultimately to prevail, and that the plaintiff had no ground for exception, unless it was shown that the court, being asked to rule as to whether the paper relied upon warranted the conclusion that the defendant's counsel sought to draw, made some ruling against the plaintiff erroneous in point of law.

If an Accused Testifies at his preliminary examination, his statements then made are admissible against him on a subsequent trial: *Dill v. State*, 35 Tex. Crim. Rep. 240, 60 Am. St. Rep. 37, 33 S. W. 126.

AINSWORTH v. LAKIN.

[180 Mass. 397, 62 N. E. 746.]

BUILDINGS, Walls of, When Revert to the Land Owner.—If one owns the first and second stories of a building, the third story of which has been conveyed to certain trustees to hold during the life of the building, and it has been destroyed by fire, leaving the walls standing, the wall of such third story immediately becomes his property. (p. 315.)

BUILDINGS, Dangerous Walls, Liability for.—If, through the destruction of a building by fire, the title to the third story of the wall thereon vests in the owner of the land, he does not immediately become liable, but, before liability grows up against him, he is entitled to a reasonable time to make necessary investigations and to take such precautions as are required to prevent the wall from doing harm. (pp. 315, 316.)

NEGLIGENCE—Care Which Land Owner Must Take to Prevent Injury by His Property.—Where a certain lawful use of property will bring to pass wrongful consequences from the condition in which the property is put, if these are not guarded against, an owner who makes such a use is bound at his peril to see that proper care is taken in every particular to prevent the wrong. (p. 317.)

NEGLIGENCE in Failing to Remove Walls Destroyed by Fire. Where there is standing in close proximity to other property the wall of a building destroyed by fire, the fall of which must injure a neighbor, the landlord must pull down such wall or use such care in its maintenance as will absolutely prevent injuries, except from causes over which he can have no control, such as vis major, acts of public enemies, or wrongful acts of third persons which human foresight could not be reasonably expected to anticipate and prevent. (p. 318.)

DAMAGES, Measure of—Interest.—In awarding damages for an injury, the jury should take into account the lapse of time since it was suffered, and put plaintiff in as good position as if the damages had been paid immediately. Therefore, they may fix such damages by ascertaining what was the amount which should have been paid at the time the injury occurred and by adding thereto such sum as will compensate delays in its payment, not exceeding the legal rate of interest. (p. 319.)

JURY TRIAL—Instructions not Technically but Substantially Accurate.—Though the trial court instructed the jury that they should allow interest from the date of the injury to the date of the verdict in estimating the amount of damages, when it should have instructed them that they should take into account the lapse of time and put plaintiff in as good position as if the damage had been paid immediately, a new trial will not be granted if there is nothing to indicate that the defendant was injured by the instruction. (p. 319.)

Tort for damage to the property of the plaintiff from the falling of a wall on the land of the defendant's intestate, and which wall had been left standing after the building of which it was a part had been destroyed by fire. Verdict for the plaintiff; the defendant alleged exceptions.

A. S. Kneil, S. S. Taft, and R. A. Allyn, for the defendant.

J. B. Carroll and W. H. McClintock, for the plaintiff.

³⁸⁶ KNOWLTON, J. The defendant's intestate was the owner of the land and of the first two stories of the building which stood upon it before the fire. The third story had been conveyed by the former owners to Lewis, Noble and Laffin, trustees, to hold during the life of the building. By the fire the life of the building was destroyed, and the ownership of Lewis and others in the third story was terminated: *Ainsworth v. Mount Moriah Lodge*, 172 Mass. 257, 52 N. E. 81. The defendant's intestate was left with his land and the walls and some other parts of the first and second stories standing upon it, and with the walls of the third story, which had previously belonged to the trustees, resting on the structure below, and connected with it as a part of the realty. All rights of other persons in the walls of the third story had come to an end. As owner of the land and of the first and second stories of the building, he was owner of everything upon it which was a part of the real estate: *Stockwell v. Hunter*, 11 Met. 448, 45 Am. Dec. 420; *Shawmut Nat. Bank v. Boston*, 118 Mass. 125. His position in reference to the walls of the third story was like that of a landlord whose tenant leaves the leased land at the end of the term with structures that he has erected upon it, which have become a part of the realty. These structures which are abandoned by the tenant immediately become the property of the landlord to whose land they are affixed: *Burk v. Hollis*, 98 Mass. 55; *Madigan v. McCarthy*, 108 Mass. 376, 11 Am. Rep. 371; *Watriss v. First Nat. Bank of Cambridge*, 124 Mass. 571, 26 Am. Rep. 694; *McIver v. Estabrook*, 134 Mass. 550.

As the owner of the land and the structures upon it which were subject to the power of gravitation, and likely to do injury to others if they fell, the defendant's intestate owed certain duties to adjacent land owners. His duty immediately after the fire was affected by the fact that until then he had had no ownership or control of the upper part of the wall, and that the condition of the whole had been greatly changed by the effect of the fire and the destruction of the connected parts. For dangers growing ³⁸⁹ out of changes which he could not prevent he was not immediately liable: *Gray v. Boston Gaslight Co.*, 114 Mass. 149, 19 Am. Rep. 324; *Mahoney v. Libbey*, 123 Mass. 20, 25 Am. Rep. 6. The jury were therefore rightly instructed that, before a liability could grow up against the defendant's intestate after

the fire, he was entitled to a reasonable time to make necessary investigation, and to take such precautions as were required to prevent the wall from doing harm.

We come next to the question, "What was his duty and what was his liability after the lapse of such a reasonable time?" There is a class of cases in which it is held that one who, for his own purposes, brings upon his land noxious substances or other things which have a tendency to escape and do great damage, is bound at his peril to confine them and keep them on his own premises. This rule is rightly applicable only to such unusual and extraordinary uses of property in reference to the benefits to be derived from the use and the dangers or losses to which others are exposed, as should not be permitted except at the sole risk of the user. The standard of duty established by the courts in these cases is that every owner shall refrain from these unwarrantable and extremely dangerous uses of property unless he provides safeguards whose perfection he guarantees. The case of *Rylands v. Fletcher*, L. R. 3 H. L. 330, *Fletcher v. Ryalls*, L. R. 1 Ex. 267, rests upon this principle. In this commonwealth the rule has been applied to the keeping of manure in a vault very near the well and the cellar of a dwelling-house of an adjacent owner: *Ball v. Nye*, 99 Mass. 582, 97 Am. Dec. 56. See, also, *Fitzpatrick v. Welch*, 174 Mass. 486, 55 N. E. 178. That there are uses of property not forbidden by law to which this doctrine properly may be applied is almost universally acknowledged.

This rule is not applicable to the construction and maintenance of the walls of an ordinary building near the land of an adjacent owner. In *Quinn v. Crimmings*, 171 Mass. 255, 258, 68 Am. St. Rep. 420, 50 N. E. 624, 626, Mr. Justice Holmes shows that in reference to the danger from the falling of a structure erected on land "the decision as to what precautions are proper naturally may vary with the nature of the particular structure." He says: "As it is desirable that buildings and fences should be put up, the law of this commonwealth does not throw the risk of that act any more than of ⁴⁰⁰ other necessary conduct upon the actor, or make every owner of a structure insure against all that may happen, however little to be foreseen."

The principle applicable to the erection of common buildings whose fall might do damage to persons or property on the adjacent premises holds owners to a less strict duty. This principle is that where a certain lawful use of property will bring to pass wrongful consequences from the condition in which the

property is put, if these are not guarded against, an owner who makes such a use is bound at his peril to see that proper care is taken in every particular to prevent the wrong: *Woodman v. Metropolitan R. R. Co.*, 149 Mass. 335, 14 Am. St. Rep. 427, 21 N. E. 482, and cases cited; *Curtis v. Kiley*, 153 Mass. 123, 26 N. E. 421; *Pye v. Faxon*, 156 Mass. 471, 31 N. E. 640; *Harding v. Boston*, 163 Mass. 14, 19, 39 N. E. 411, and cases cited; *Cabot v. Kingman*, 166 Mass. 403, 406, 44 N. E. 344; *Robbins v. Atkins*, 168 Mass. 45, 46 N. E. 425; *Thompson v. Lowell etc. Ry. Co.*, 170 Mass. 577, 64 Am. St. Rep. 323, 49 N. E. 913; *Quinn v. Crimmings*, 171 Mass. 255, 256, 68 Am. St. Rep. 420, 50 N. E. 624; *Boomer v. Wilbur*, 176 Mass. 482, 57 N. E. 1004; *Ses-sengut v. Posey*, 67 Ind. 408, 33 Am. Rep. 98; *Anderson v. East*, 117 Ind. 126, 10 Am. St. Rep. 35, 19 N. E. 726; *Chicago v. Rob-bins*, 2 Black, 418, 428; *Homan v. Stanley*, 66 Pa. St. 464, 5 Am. Rep. 389; *Mayor of New York v. Bailey*, 2 Denio, 433; *Bower v. Peate*, 1 Q. B. D. 321; *Tarry v. Ashton*, 1 Q. B. D. 314; *Gray v. Pullen*, 5 Best & S. 970, 981; *Dalton v. Angus*, 6 App. Cas. 740, 829. The duty which the law imposes upon an owner of real estate in such a case is to make the conditions safe so far as it can be done by the exercise of ordinary care on the part of all those engaged in the work. He is responsible for the negligence of independent contractors as well as for that of his servants. This rule is applicable to everyone who builds an ordinary wall which is liable to do serious injury by falling outside of his own premises. It is the rule on which the decision in *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 234, rests, and the case is not an authority for any liability of a land owner that goes beyond this: See, also, *Gray v. Harris*, 107 Mass. 492, 9 Am. Rep. 61; *Shrewsbury v. Smith*, 12 Cush. 177. The uses of property governed by this rule are those that bring new conditions which involve risks to the persons or property of others, but which are ordinary and usual, and, in a sense, natural, as incident to the ownership of the land. The rule first referred to applies to unusual and extraordinary uses which are so fraught ⁴⁰¹ with peril to others that the owner should not be permitted to adopt them for his own purposes without absolutely protecting his neighbors from injury or loss by reason of the use. In England this rule which was laid down in *Rylands v. Fletcher*, L. R. 3 H. L. 330, L. R. 1 Ex. 267, in reference to a reservoir of water, has since been held to be inapplicable where the collection of the water is in the natural and ordinary use of the land: *Fletcher v. Smith*, 2 App. Cas. 781. See *Carstairs v. Taylor*, L.

R. 6 Ex. 217. So far as we know, there is no case in which it has been applied to the erection or maintenance of the walls of an ordinary building.

The construction which should be put upon the judge's charge in regard to liability for standing walls is by no means certain. Some broad statements in it might seem to indicate that he was laying down a rule applicable to the construction and maintenance of walls of ordinary buildings so situated that if they fall they will be likely to injure the property of the adjacent owner. If this were the meaning, the instructions would be wrong. But taking the charge in its different parts in connection with the facts stated in the bill of exceptions, we think it was intended to state the rule applicable to the kind of wall that the jury were considering, and not to the walls of buildings generally. As was decided in a previous suit brought by this plaintiff, the life of the building had been destroyed by fire, and the walls which subsequently fell were no longer used in supporting a building: *Ainsworth v. Mount Moriah Lodge*, 172 Mass. 257, 52 N. E. 81. Not only was this the testimony of the plaintiff's witnesses, but it was the substance of the evidence introduced by the defendant. His experts testified that before any part of the wall could safely be built upon, the third story at least would have to be taken down. This upper part of the wall was that which was most in danger of falling, and the part whose fall would be most likely to do damage. To maintain it, or to leave it standing to its full height, could serve no useful purpose. Its condition in reference to fitness for use was an undisputed fact on the evidence. Instead of being a part of a building adapted to occupation it was a part of the ruins of a building. To maintain such a wall after the expiration of a reasonable time for investigation and for its removal, would not be a reasonable and proper use of one's property. It was the duty of the defendant not to ⁴⁰²suffer such a wall to remain on his land where its fall would injure his neighbor, without using such care in the maintenance of it as would absolutely prevent injuries, except from causes over which he would have no control, such as vis major, acts of public enemies, or wrongful acts of third persons which human foresight could not reasonably be expected to anticipate and prevent. This was the rule of law stated by the judge to the jury. With this construction of the charge we think that the jury were rightly directed to a consideration of the evidence on the principal issue of fact.

The jury were instructed to allow interest on the amount of

damages from the date of the injury. It would have been more accurate to instruct them that in assessing damages of this kind a plaintiff is not to be awarded interest as interest, but that in ascertaining the damage at the date of the verdict, the jury should take into account the lapse of time, and put the plaintiff in as good a position in reference to the injury as if the damages directly resulting from it had been paid immediately: *Frazer v. Bigelow Carpet Co.*, 141 Mass. 126, 4 N. E. 620. This principle would authorize the jury to fix the damages at the date of their verdict by adding interest at the legal rate on the amount of damages at the time of the injury, but it would not require them to do this. There might be circumstances such that an allowance less than interest at six per cent would compensate for the delay. The damages in this case were of a different character from the amount to be awarded for the taking of land under the right of eminent domain, in which the value of the property rights taken should be paid at the time of the taking: See *Old Colony R. R. Co. v. Miller*, 125 Mass. 1, 3, 28 Am. Rep. 194. But it does not appear that there was anything in this case to take it out of the ordinary rule in regard to compensation for a delay in payment by the allowance of interest. In the absence of anything in the bill of exceptions to show that the defendant was injured by the instruction, we are of opinion that a new trial should not be granted.

The defendant made many requests for instructions which we do not think it necessary to consider more particularly.

Exceptions overruled.

The Owner of Property holds it subject to the implied obligation that he will so use it as not to interfere with the rights of others: *State v. Yopp*, 97 N. C. 477, 2 Am. St. Rep. 305, 2 S. E. 458; *Sullivan v. Dunham*, 161 N. Y. 290, 76 Am. St. Rep. 274, 55 N. E. 923. As to his liability for the falling of defective walls, see *Ryder v. Kinsey*, 62 Minn. 85, 54 Am. St. Rep. 623, 64 N. W. 94; *Schwartz v. Gilmore*, 45 Ill. 455, 92 Am. Dec. 227; *Mahoney v. Libbey*, 123 Mass. 20, 25 Am. Rep. 6; *Cork v. Blossom*, 162 Mass. 330, 44 Am. St. Rep. 362, 38 N. E. 495.

FOLSOM v. BARRETT.

[180 Mass. 439, 62 N. E. 723.]

LIEN—When not Waived by Demanding a Sum Greater than that Due.—If one entitled to retain personal property until a lien in his favor thereon is paid demands a sum exceeding that due him, he does not thereby waive his lien nor forfeit his right to retain possession of the property, if his demand was made in good faith and in the belief that he was entitled to such sum, and no payment or tender was made of the amount actually due. (p. 321.)

TENDER of Amount to Satisfy a Lien, when not Waived.—Though a lienholder states that he will not deliver personal property until paid a sum which he names, and which is in excess of that to which he is entitled, this is not a waiver of a tender of the amount actually due, where it does not appear that he had reason to believe that the other party was thinking of a tender and prepared to make it. (p. 322.)

LIENHOLDER—Right of to the Expenses of Keeping Property.—The owner of a horse which another is holding as security for the payment of a debt is personally liable for the expenses of keeping such horse after a demand made for its possession, and a demand in good faith by the lienholder of a sum in excess of that due, if such owner does not tender the sum due, and such tender is not waived. (p. 323.)

Action to recover a balance claimed to be due from the defendant to the plaintiff for commissions for buying and selling horses, and for board and training and other expenses incurred on account of a horse called "Sun Pointer." One question involved was whether the plaintiff was entitled to recover anything on account of that horse after July 27, 1899. On that day defendant demanded the horse, but the plaintiff refused to deliver him until paid three hundred dollars and ninety-six cents on account of his board and other expenses incurred for him. The auditor to whom the case was referred found that the sum due on such day was only one hundred and twenty-nine dollars and seventeen cents. The report of the auditor was received in evidence on the trial, and thereafter the defendant asked for the instructions stated in the opinion of the court, and, a verdict having been returned against him, alleged exceptions.

W. R. Buckminster, for the defendant.

P. B. Runyan, for the plaintiff.

440 HAMMOND, J. On July 27, 1899, the plaintiff had a lien upon the horse "Sun Pointer," to secure him for the payment of the expenses of its keeping up to that time. The amount due as claimed by the plaintiff was three hundred dollars

and ninety-six cents, and, although requested by the defendant, he refused to deliver up the horse except upon the payment of that sum. The auditor has found that the balance due at that time was only one hundred and twenty-nine dollars and seventeen cents.

The defendant requested the judge to rule in substance, that (1) if the defendant demanded the horse of the plaintiff, and the plaintiff refused to deliver him up except upon the payment of a certain sum which was larger than the sum actually due, then as matter of law the plaintiff wrongfully held the horse; and (2) if the defendant requested of the plaintiff a statement of the amount due, so that the defendant could pay what was due and take his horse, and if upon that the plaintiff stated that he would not give up the horse except upon the payment of a certain sum then named by him, which was materially in excess of the amount actually due, then the defendant was not bound to tender any sum to the plaintiff, and the latter wrongfully held the horse.

The judge refused to rule as requested, but ruled in substance ⁴⁴¹ that if the plaintiff fraudulently claimed more than was due for the purpose of keeping possession of the horse, he wrongfully kept the horse; but that if he believed the sum due him to be as stated by him at the time he refused to deliver the horse, then the fact that that sum was excessive would not work a discharge of the lien. No instructions were given as to the subject of tender.

Where a lienor bases his refusal to surrender property upon some right independent of or inconsistent with the lien, it is held that he has waived his lien, and he cannot afterward set it up: *Boardman v. Sill*, 1 Camp. 410, note; *Dirks v. Richards*, 4 Man. & G. 574. But that is not this case. Here the plaintiff expressly named his lien and insisted upon it, and there was no question as to its nature. It was for the keeping of the horse a certain definite time. He based his right to hold the horse upon that lien, and upon nothing else. His demand, however, was excessive. He was right as to the existence of the lien upon which right alone he was insisting, but wrong as to the amount due. If he fraudulently claimed more than was due, he lost his lien, but if his claim was made in good faith, it was still in the power of the defendant to discharge the lien by a payment of the sum actually due. If such a payment had been made at that time, the lien would have been destroyed, and consequently the subsequent detention of the horse by the plaintiff would have

been wrongful; and that would have been so whether or not the plaintiff honestly believed his claim to be correct. The lien was simply a right to hold the horse until a certain sum was paid, and when that sum was paid the right was gone. The good faith of the plaintiff could not increase that sum. The same result would have followed if a tender of the sum due had been made and refused: *Coke on Littleton*, 207a; *Coggs v. Bernard*, *Ld. Raym.* 909, 917; *Bacon's Abridgment*, "Bailment" (B); *Jarvis v. Rogers*, 15 *Mass.* 389, 409; *Schayer v. Commonwealth Loan Co.*, 163 *Mass.* 322, 39 *N. E.* 1110, and cases cited.

No payment or tender, however, was made; and where, as in this case, there is a lien which is insisted upon by the creditor, and his only error is in making an excessive demand which he honestly believes to be correct, the fact that the demand is excessive does not ordinarily relieve the debtor from the necessity⁴⁴² of making a tender. If the debtor desires to avail himself of this honest mistake of the creditor, he must make or tender payment of the sum actually due, and neither the ability, readiness or simple offer to pay is a tender. There must be an actual production of the money, unless such production be dispensed with by the express declaration of the creditor that he will not accept it, or by some equivalent declaration or act: *Thomas v. Evans*, 10 *East.* 101; *Breed v. Hurd*, 6 *Pick.* 356. See *Chitty on Contracts*, 10th *Am. ed.*, 890, 891, and cases cited.

We are of opinion that there is no evidence in this case of any declaration or conduct of the plaintiff which would excuse the defendant from making an actual tender. It is true that the bill recites that the plaintiff refused to deliver up the horse except upon the payment of the three hundred dollars and ninety-six cents, but it does not appear that the defendant ever desired or attempted to make, or indeed that he ever was ready to make, any tender whatever, or that the plaintiff ever had any reason to suppose that in any of the interviews with the defendant the latter was thinking of a tender, or was prepared then and there to make it, or to make any exhibition of money. Under these circumstances, the simple statement made by the plaintiff at the time the horse was demanded, that he would not deliver him up except upon payment of the whole sum, is not enough to warrant a finding, that he had dispensed with the right to an exhibition of the money of the defendant, or, in other words, that he had waived the right to a formal and complete tender; and the judge presiding at the trial was right in declining to instruct as to the law of tender.

The case is clearly distinguishable from *Hamilton v. McLaughlin*, 145 Mass. 20, 12 N. E. 424, upon which the defendant relies. There being no tender and no lawful excuse for not making one, there was no error in instructing the jury that in this case the lien was not lost by the excessive demand made by the plaintiff in good faith: *Kerford v. Mondel*, 5 Hurl. & N. 931; *Alderson, B.*, in *Jones v. Tarleton*, 9 Mees. & W. 675; *Jones on Liens*, secs. 1025, 1026, and cases therein cited. See, also, *Fowler v. Parsons*, 143 Mass. 401, 9 N. E. 799.

That being so, the further question remains whether the plaintiff can hold the defendant personally liable for the expense incurred after the demand. At common law, a lienor not only had the right to keep the object of the lien, but he could do nothing ⁴⁴³ else with it if he desired to maintain his lien. If he lost possession, he lost his lien; if he sold, he was guilty of conversion; and, although there is now quite generally some statutory provision for a sale, still there can be no doubt that in this state it is optional with the lienor whether to enforce his lien under the statute or under the common law. The plaintiff kept the horse, as he had a right to keep it, and he kept it for the defendant—that is to say, he kept it so that when the sum due was paid, the horse could be delivered up. In keeping the horse, the plaintiff was performing a duty he owed to the defendant, which was to keep the horse for him. The horse must be fed or die, and both parties knew that. It does not appear that the defendant ever relieved the plaintiff from that duty by giving him to understand that the original contract by which the charge of keeping was to be at the defendant's expense was necessarily ended by the plaintiff's refusal to give up the horse unless the bill was paid, or that he never should discharge the lien. For aught that appears to the contrary, the defendant may have acquiesced in the position of the plaintiff as reasonable and in accordance with the contract. If he intended to revoke the contract for board, he should have manifested that intent. Under these circumstances, we think that the law raises a promise on the part of the defendant to pay for the expense incurred after the time of the demand. The horse was left by the defendant in the hands of the plaintiff without the latter's fault, and the plaintiff was bound to take reasonable measures for its preservation. For this expense he may hold the horse or recover against the defendant: See *Great Northern Ry. Co. v. Swaffield*, L. R. 9 Ex. 132.

Exceptions overruled.

A *Bailee's Lien* is waived by an unqualified refusal to deliver the chattel to the owner, without placing the refusal on the ground of the lien: *Hanna v. Phelps*, 7 Ind. 21, 63 Am. Dec. 410, and note.

HOMANS v. BOSTON ELEVATED RAILWAY COMPANY.

[180 Mass. 456, 62 N. E. 737.]

DAMAGES for Nervous Shock.—If the plaintiff, in consequence of a collision, received certain physical injuries on account of which the defendant is liable, and also a nervous shock, she is entitled to recover for the consequences of the shock, whether it was due to, or merely accompanied, the visible injury. (p. 325.)

Tort for injuries suffered from a collision near the subway on Boylston street, Boston, by which the plaintiff was thrown against the seat of a car, receiving certain bruises and also a nervous shock which was later followed by paralysis. Verdict for the plaintiff, and defendant alleged exceptions.

P. H. Cooney and A. I. Peckham, for the defendant.

M. Coggan, for the plaintiff.

⁴⁵⁷ **HOLMES, C. J.** This is an action for personal injuries. The plaintiff was in one of the defendant's cars and was thrown against a seat, receiving a slight blow, in consequence of a collision for which the defendant was to blame. She afterward had a good deal of suffering of a hysterical nature, and the question before us on the exceptions concerns the rule of liability for the nervous shock. It was decided in *Spade v. Lynn etc. R. R. Co.*, 172 Mass. 488, 70 Am. St. Rep. 298, 42 N. E. 747, that, if the defendant was a wrongdoer, it must answer for the actual consequences of the battery to the plaintiff as she was, although she might be abnormally nervous. It was also decided, however, that if a nervous shock was due to causes for which the defendant was not answerable, such as the behavior of a drunken man whom it was engaged in removing, it could not be held for the shock, notwithstanding its liability for a battery happening at the same time. The defendant, by various requests, tried to press the latter principle so far as to require the plaintiff to prove that the nervous shock was the consequence of the battery, whereas the judge allowed her to recover for a shock ending in paralysis if it resulted from a jar to her nervous system which accompanied the blow to her person. It was understood, of

course, that the jar was due to the same cause as the blow, and both to the defendant's fault.

We are of opinion that the judge was right, and that further refining would be wrong. As has been explained repeatedly, it is an arbitrary exception, based upon a notion of what is practicable, that prevents a recovery for visible illness resulting from nervous shock alone: *Spade v. Lynn etc. R. R. Co.*, 168 ⁴⁵⁸ Mass. 285, 288, 60 Am. St. Rep. 393, 47 N. E. 88; *Smith v. Postal Tel. Cable Co.*, 174 Mass. 576, 75 Am. St. Rep. 374, 55 N. E. 380. But when there has been a battery and the nervous shock results from the same wrongful management as the battery, it is at least equally impracticable to go further and to inquire whether the shock comes through the battery or along with it. Even were it otherwise, recognizing, as we must, the logic in favor of the plaintiff when a remedy is denied because the only immediate wrong was a shock to the nerves, we think that when the reality of the cause is guaranteed by proof of a substantial battery of the person, there is no occasion to press further the exception to general rules. The difference between this case and the *Spade* case in its second presentation is that in the latter the defendant's wrong, if any, began with the battery, and it was not responsible for the previous sources of fear, whereas here the defendant was responsible for the trouble throughout. The decisions, although not explicit, favor the conclusion to which we have come: *Canning v. Williamstown*, 1 Cush. 451; *Warren v. Boston etc. R. R. Co.*, 163 Mass. 484, 487, 40 N. E. 895.

Exceptions overruled.

Damages cannot be recovered for mere fright or mental shock alone: *St. Louis etc. Ry. Co. v. Bragg*, 69 Ark. 402, 86 Am. St. Rep. 206, 64 S. W. 226; *Lee v. Burlington*, 113 Iowa, 356, 86 Am. St. Rep. 379, 85 N. W. 618. But damages may be had if there is contemporaneous physical injury: *Nelson v. Crawford*, 122 Mich. 466, 80 Am. St. Rep. 577, 81 N. W. 335; monographic note to *Gulf etc. Ry. Co. v. Hayter*, 77 Am. St. Rep. 860.

EARLE v. COMMONWEALTH.

[180 Mass. 579, 63 N. E. 10.]

EMINENT DOMAIN—Constitutionality of Statute Allowing Damages.—It is within the power of the legislature to authorize the allowance of damages in proceedings in the exercise of the power of eminent domain, though such damages are of a character for which it need not have authorized such allowance. The legislature is not forbidden to be just in some cases where it is not required to be by the letter of paramount law. (p. 329.)

EMINENT DOMAIN—Constitutionality of Statutes Allowing Compensation for Loss of Business.—A statute authorizing, in proceedings in the exercise of the power of eminent domain, an allowance to persons who have the possession of lands in a specified town, whether such lands were taken or not, for decrease in the value of business, is not unconstitutional. (p. 329.)

EMINENT DOMAIN—Owner of Established Business on Land, Who Is.—Under a statute providing that anyone owning an established business in a designated town, whether on lands taken or not, shall be allowed damages for a decrease in the value of his business, whether by loss of custom or otherwise, a physician who has his office in a house belonging to his wife, which is taken under the act, is entitled to be allowed for any loss accruing to him by the consequent changing of his place of business. (p. 329.)

EMINENT DOMAIN—Market Value—When not the Measure of Damages.—Under a statute allowing compensation for decrease in value of business due to carrying out a statute, the amount recoverable is not measured by the difference in the market value of the business before and after the taking, but by the difference in value between the business carried on before the proceeding was taken under the statute and a similar business carried on by the same person in the nearest available place. (p. 330.)

Petition for the assessment of damages under section 14 of the metropolitan water supply act: Stats. 1895, c. 488. The section is as follows: "In case any individual or firm owning on the first day of April, the year one thousand eight hundred and ninety-five, an established business on land in the town of West Boylston, whether the same shall be taken or not under this act, or the heirs or personal representatives of such individual or firm, shall deem that such business is decreased in value by the carrying out of this act, whether by loss of custom or otherwise, and unable to agree with said board as to the amount of damages to be paid for such injury, such damages shall be determined and paid in the manner hereinbefore provided."

The petitioner established himself as a practising physician in West Boylston in 1881. He continued in such business, and in April, 1895, resided and had his office in a house belonging to his wife, and which was taken by the metropolitan water board,

acting under the statute above referred to. He had built up a practise extending throughout West Boylston, Holden, West Sterling, the edge of Princeton, Boylston Center, and some other places. His gross income up to 1891 or 1892 was about \$2,500 per year. In 1893 he doubled the charges for his visits and consultations, and in the following year opened an office in Worcester, which he kept until 1898, at first visiting it three times a week, and later on every afternoon. His gross income in 1892 was \$3,046.25; in 1893, \$2,368.75; in 1894, \$1,286.25; in 1895, \$1,365.25; in 1896, \$1,315.20; in 1897, \$1,073.25, not including his Worcester practice. After leaving West Boylston, in 1898, he went to New York and studied there for the purpose of becoming a specialist in diseases of the eye. He resumed practice in Massachusetts in 1901 as a specialist, but did not afterward earn any money beyond his expenses.

The claim of petitioner was objected to on the ground that he had not shown that he owned "an established business on land in the town of West Boylston." The commissioners found that the taking of the land at West Boylston practically embraced all the business part of the town, wiped out all important industries, and necessarily affected the petitioner to a considerable extent, and they reported that if the court should be of the opinion that the provisions of section 14 covered injuries to the business of a practising physician who resided within the territory taken, and visited patients there and in neighboring towns, and there had his established office to which patients resorted for advice, that the petitioner was entitled to recover damages.

The commonwealth insisted that the rule of damages in this case was the difference between the market value of the business April 1, 1895, and its market value after carrying out the provisions of the act, and requested the commissioners to rule that the petitioner had not shown that he owned an established business in or on the land in the town of West Boylston, and was, therefore, not entitled to damages; that if he was entitled to recover at all, the measure of damages was the difference between the market value of the business owned by him on land in West Boylston on the 1st of April, 1895, and its market value after the carrying out of the act; that the commissioners find that the established business owned by the petitioner was not decreased in value by carrying out the act; and that the evidence of what petitioner had earned since the abandonment of his general practise was not evidence of what he could have earned had he attempted to build up a general practise. The commis-

sioners refused to give any of the rulings requested. Respondent excepted.

The petitioner insisted that he was entitled to recover such a sum of money as would give him the equivalent of his loss of income by reason of the taking, for such reasonable time as would be required to get back into a practise of the same amount which he had had in West Boylston on April 1, 1895. If the court should adopt the rule of damages contended for by respondent, the commissioners found the amount would be \$750.00, but if the court should adopt the rule of damages contended for by the petitioner, the commissioners found the amount should be \$7,360.

It was also contended that the provisions of section 14 were unconstitutional.

R. M. Morse, for the petitioner.

J. M. Hallowell and A. W. DeGoosh, assistant attorneys general, for the commonwealth.

⁵⁸² HOLMES, C. J. This is a petition brought by a practising physician to recover for damage to his business by the carrying out of the metropolitan water supply act: Stats. 1895, c. 488, sec. 14. The case was referred to a commission. It reports that the plaintiff lived and had his office in West Boylston, and had a practise which extended through that and some neighboring towns. The taking of land at West Boylston necessarily affected his business to a considerable extent, and the damages are assessed at alternative sums according to the rules suggested by the plaintiff and defendant respectively. The questions of law arising on the report were reserved by one of the justices for the consideration of the full court.

The commonwealth in the first place contends that the material portion of the statute, if it applies to cases like this, is unconstitutional. The ground seems to be that taxes cannot be levied for purposes of this sort, except to pay for property taken or destroyed, and that the business of a doctor is not property within the principle. The test of what may be required to be ⁵⁸³ paid for if destroyed or damaged under the power of eminent domain, is not whether the same thing could have been sold, nor is it whether the destruction or harm could have been authorized without a provision for payment. Very likely the plaintiff's rights were of a kind that might have been damaged, if not destroyed, without the constitutional necessity of compen-

sation. But some latitude is allowed to the legislature. It is not forbidden to be just in some cases where it is not required to be by the letter of paramount law. We think it so plain that, as was assumed by everybody in *Sawyer v. Metropolitan Water Board*, 178 Mass. 267, 59 N. E. 658, the provision is constitutional, that we prefer to say so without stopping to consider whether the question is open: See *Opinion of Justices*, 175 Mass. 599, 57 N. E. 675; *Town of Guilford v. Supervisors of Chenango County*, 13 N. Y. 143, 149; *Blanding v. Burr*, 13 Cal. 343; *United States v. Realty Co.*, 163 U. S. 427, 16 Sup. Ct. Rep. 1120; *Guthrie Nat. Bank v. Guthrie*, 173 U. S. 528, 536, 537, 19 Sup. Ct. Rep. 513; *New Orleans v. Clark*, 95 U. S. 644.

Next it is contended that the petitioner was not an "individual owning an established business on land in the town of West Boylston" within the meaning of section 14. A majority of the court does not see why not. The defendant cites *Ex parte Breull*, 16 Ch. Div. 484, for the proposition that the word "business" has no definite technical meaning. We agree, and think it quite wide enough to include the practise of a doctor. It is suggested that the practise was not established on land in West Boylston. It is true that a doctor can give advice elsewhere than in his office, and that in fact he does so to a greater extent than a shopkeeper sells his goods outside his shop. But no less than a shopkeeper a doctor usually has, as the petitioner had, a locally established center to which patients resort, and from which he goes his rounds. There is even a certain amount of salable goodwill, as is made familiar to us by English law and literature as well as by an occasional case in our own reports: *Smith v. Bergengren*, 153 Mass. 236, 26 N. E. 690.

The respondent demanded a finding or ruling that the petitioner's business was not decreased in value by the carrying out of the act, because of the figures given for his income in 1894 and 1895, and later. But the commission may have found, and, for all that we can see, rightly, that the diminution of ⁵⁸⁴ income before April 1, 1895, was due to precautions taken by the petitioner in anticipation of the change, and we are unable to say that the respondent's request should have been granted.

The respondent next contends that the measure of damages is the difference in the market value of the business between April 1, 1895, and after the act was carried out. This recurs to the notion that the only interests which the law will recognize are salable, and that the petitioner can recover only for such good-

will as might have been transferred for cash. The word "owning" in the statute is invoked. We shall not speculate whether ownership of an equitable life estate would be denied to a legatee deprived of the right of alienation. It is enough to say that, if the petitioner's business is within the protection of the act and "is decreased in value," damages are to be paid for "such injury"—that is to say, for the actual decrease in value of that business, not for the decrease in the value of such elements in it, only, as admitted of being sold. There is no practical difficulty in the way of carrying out the statute according to its meaning. The money value of the petitioner's business could be estimated, even though absolutely personal to himself.

But the rule suggested by the petitioner also seems to us unsafe on the facts before us. The damage theoretically would be the difference in value between the business as it had been and as it was left. Perhaps it might be reached by taking the difference in value between the business carried on as it was in West Boylston and a similar business carried on by the petitioner in the nearest available place, bearing in mind the effect of requiring all West Boylston patients to move. It may be that the commission will find as a practical matter that the method suggested by the petitioner is as near as can be got to the thing to be determined, but as the case stands we do not feel warranted in adopting it. The commission has not said that it could not make an estimate on more obviously correct principles. It has confined itself to finding the damages according to the rules suggested on the two sides.

A request for a ruling that what the petitioner had earned as a specialist since his abandonment of his general practise could not be considered, went too far. Undoubtedly, the evidence was not very important, and probably it was not regarded as being so.

Report recommitted.

Damages in Eminent Domain do not, as a rule, include injury to business or the goodwill thereof: See the monographic note to Board of Trade Tel. Co. v. Darst, 85 Am. St. Rep. 299.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

ATWATER v. SPALDING.

[86 Minn. 101, 90 N. W. 370.]

EJECTMENT—Complaint, Sufficiency of.—A complaint in ejectment alleging that plaintiff is the owner and entitled to the possession of the land described therein, and that it is wrongfully withheld, is sufficient, without alleging in detail the particular facts upon which his claim of title is based. (p. 331.)

Welch, Hayne & Hubachek, for the appellant.

Cohen, Atwater & Shaw, for the respondent.

¹⁰¹ COLLINS, J. In *Curtiss v. Livingston*, 36 Minn. 380, 31 N. W. 357, it was said, obiter, that "in ejectment it is sufficient for plaintiff to allege that ¹⁰² he is the owner and entitled to the possession, and that the land is wrongfully withheld, without alleging in detail the particular facts on which his claim of title is based." This is a correct statement of the rule which should prevail whenever the statute requires, as it does in this jurisdiction, that all complaints shall contain a plain and concise statement of the facts constituting the cause of action, without unnecessary repetition. That it would be so held by this court has been foreshadowed, in addition to the case above cited, in *Kipp v. Bullard*, 30 Minn. 84, 14 N. W. 364; *Stuart v. Lowry*, 49 Minn. 91, 51 N. W. 662; *Freeman v. Brewster*, 70 Minn. 203, 72 N. W. 1068; *Parker v. Minneapolis etc. R. R. Co.*, 79 Minn. 372, 82 N. W. 673; while the case of *McArthur v. Clark*, 86 Minn. 165, post, p. 333, 90 N. W. 369, seems conclusive upon the question. This rule has been indorsed elsewhere: *Garwood v. Hastings*, 38 Cal. 216; *Burt v. Bowles*, 69

Ind. 1. See, also, *Johnson v. Crookshanks*, 21 Or. 339, 28 Pac. 78.

There are courts in which it has been held that in ejectment it is necessary to go further, and set up in the complaint the nature, quality, and kind of ownership, but we regard these decisions as altogether too narrow and technical for code pleading. "Owner," according to *Black's Dictionary*, is the person "in whom is vested the ownership, dominion, or title of property." Webster defines an "owner" as "one who owns; a rightful proprietor; one who has the legal or rightful title, whether he is the possessor or not."

In actions of replevin, a plaintiff may, under our system, allege generally that he is the owner and entitled to the immediate possession of the property, and under such an allegation may prove any right of property, general or special, that entitles him to possession: *Miller v. Adamson*, 45 Minn. 99, 47 N. W. 452; *Adamson v. Wiggins*, 45 Minn. 448, 48 N. W. 185; *Cumbey v. Lovett*, 76 Minn. 227, 79 N. W. 99. There is no reason why the same rule should not apply in ejectment. Both actions are possessory. It is the "possessory title" which is important, and in both the plaintiff must show that he is entitled to immediate possession in order to recover, no matter in what form his title may be.

Order affirmed.

Ejectment.—In an action to recover real property under the code system of pleading, no particular form of complaint is necessary; it is only required that it should be adapted to the estate sought to be recovered and the facts desired to be put in issue: *Caperton v. Schmidt*, 26 Cal. 479, 85 Am. Dec. 187. A general allegation of ownership is sufficient: *McArthur v. Clark*, 86 Minn. 165, post, p. 333, 90 N. W. 369.

McARTHUR v. CLARK.

[86 Minn. 165, 90 N. W. 369.]

OWNERSHIP—Pleading.—A general allegation of ownership of real property, in a pleading in either a legal or an equitable action, is sufficient to admit proof of any legal title held by the pleader. (p. 334.)

PARTITION.—Rules of Pleading, Practise and Evidence applicable generally to civil actions apply to an action for partition. (p. 334.)

PARTITION—Pleading and Proof—Adverse Possession.—A general allegation by a defendant in his answer to a suit in partition, of his ownership of the property, is sufficient to admit proof of his title by adverse possession, and the effect of such evidence is not only to bar plaintiff's right of action, but also to establish an absolute legal title in the defendant. (p. 334.)

W. H. Harries, for the appellant.

Duxbury & Duxbury, for the respondents.

166 BROWN, J. Action for partition. Defendants had judgment, and plaintiff appealed from an order denying her motion for a new trial.

There is only one question presented in the case, and that is whether the trial court erred in receiving evidence offered by defendants tending to show title in them to the land in controversy by adverse possession.

Plaintiff alleges in her complaint, in general terms, that she is the owner of an undivided three-fourths of the land in controversy, that the defendants are the owners of an undivided one-fourth, that she is desirous of having a partition of the land, and prays judgment accordingly. The defendants answer (a) by a general denial; and (b) that the defendants are the owners in fee of the land described in the complaint, and in the possession thereof, and that plaintiff has no right, title, or interest therein. Plaintiff did not disclose in the complaint the source of her title, nor do defendants disclose the source of their title. On the trial, plaintiff offered certain documentary evidence tending to show the title to the property to be as alleged in the complaint, and rested her case, whereupon defendants offered evidence tending to show that they had been in actual, open, notorious, and continuous possession of the land for more than fifteen years, to which counsel for appellant objected on the ground that defendants had not alleged any such title in their answer. The court overruled the objection, received the evidence, and

found as a fact that defendants were the owners of the land in controversy, by reason of such adverse possession; and judgment was ordered in their favor. The only question, as already suggested, is whether the evidence tending to prove defendants' title was admissible under the answer; the same not having been specifically pleaded.

The rule has long been settled in this state in respect to actions concerning rights in real property, and also rights in personal property, ¹⁶⁷ that a general allegation of ownership in a pleading is sufficient to admit proof of any legal title, general or special: *Kipp v. Bullard*, 30 Minn. 84, 14 N. W. 364; *Wells v. Masterson*, 6 Minn. 401 (566); *Miller v. Adamson*, 45 Minn. 99, 47 N. W. 452; *Adamson v. Wiggins*, 45 Minn. 448, 48 N. W. 185; *Stuart v. Lowry*, 49 Minn. 91, 51 N. W. 662; *Travelers' Ins. Co. v. Walker*, 77 Minn. 438, 80 N. W. 618; *Freeman v. Brewster*, 70 Minn. 203, 72 N. W. 1068. An allegation of title in general terms, without stating the source thereof, is an allegation of legal title only, and under such an allegation any legal title may be shown: *Stuart v. Lowry*, 49 Minn. 91, 51 N. W. 662.

Though this is an action for partition, and may be classed, as counsel for appellant contends, as an equitable proceeding Gen. Stats. 1894, c. 74, under which it is authorized and conducted, expressly provides that the proceedings shall be governed by the rules and provisions of law applicable to civil actions; and, in the nature of things, this includes all rules relating to pleading, practise, and evidence applicable to ordinary civil actions. In a complaint in ejectment, or an action to determine adverse claims, or in any action where the title to real property is involved, under a general allegation of ownership in the complaint a title by adverse possession may be shown. No reason occurs to us why the same rule should not apply to an answer and to a case where the defendant alleges generally that he is the owner of the property involved in the action; and entitled to its possession. If the plaintiff may prove title by adverse possession under such a general allegation, clearly the same rule should apply to the defendant.

Proof of facts constituting title by adverse possession is more than mere proof of the statute of limitations, as respects plaintiff's right of recovery. It goes beyond this, and not only bars his right of action, but shows an absolute legal title in defendant: *Nelson v. Brodhack*, 44 Mo. 596, 100 Am. Dec. 328; *Oldig v. Fisk*, 53 Neb. 156, 73 N. W. 661; *Fink v. Dawson*,

52 Neb. 647, 72 N. W. 1037; Donahue v. Thompson, 60 Wis. 500, 19 N. W. 520; 13 Ency. of Pl. & Pr. 284. There can be no distinction, so far as this rule of pleading is concerned, between legal and equitable actions. Of course, if an equitable title is relied upon, all facts constituting it must be specially pleaded, but ¹⁶⁸ a legal title may be shown under a general allegation: Freeman v. Brewster, 70 Minn. 203, 72 N. W. 1068. A general allegation of ownership in an equitable action, whether shown in the complaint or answer, is just as effective and comprehensive as in an action at law, and admits of similar proof of title: Buckholz v. Grant, 15 Minn. 329 (406); Curtiss v. Livingston, 36 Minn. 380, 31 N. W. 357; Souter v. Maguire, 78 Cal. 543, 21 Pac. 183; Schneider v. Seibert, 50 Ill. 284; McKenzie v. Baldridge, 49 Ala. 564.

If the mere question as to whether plaintiff's right of action was barred by the statute of limitations was alone involved, then, within the decisions of this court, the statute would not be available to defendant unless pleaded. But the defense of title by adverse possession in the case at bar, as we have already suggested, goes further than to bar the plaintiff's right of action. It establishes legal title to the property in defendants. Clearly, under our rules of pleading in actions of this kind, whatever may be the rule in other states, the allegations of the answer were sufficient, and the evidence was properly received thereunder: La Plante v. Lee, 83 Ind. 159; Hill v. Bailey, 8 Mo. App. 85.

Order affirmed.

Pleading.—In ejectment the defendant may prove a prescriptive title in support of his general denial of the plaintiff's ownership: Cheatham v. Young, 113 N. C. 161, 37 Am. St. Rep. 617, 18 S. E. 92; Stocker v. Green, 94 Mo. 280, 7 S. W. 279, 4 Am. St. Rep. 382, and note. In fact, he may introduce any evidence tending to defeat the plaintiff's title: Sparrow v. Rhoades, 76 Cal. 208, 9 Am. St. Rep. 197, 18 Pac. 245. And a complaint alleging that the plaintiff is the owner and entitled to the possession of the land described and that it is wrongfully withheld, is sufficient: Atwater v. Spalding, 86 Minn. 101, ante, p. 331, 90 N. W. 370.

NORTHERN PACIFIC RAILWAY COMPANY v. OWENS.

[86 Minn. 188, 90 N. W. 371.]

OFFICERS—Liability for Moneys Stolen from.—If a statute, either in direct terms or from its general tenor, imposes a duty upon a public officer to pay over money received by him in his official capacity either for the public or private parties, the obligation thus imposed is an absolute one and binding on his sureties. The plea that the money has been stolen or lost without his fault does not constitute a defense to an action for its recovery. This rule applies to a clerk of a district court as to money received under condemnation proceedings. (pp. 340, 342.)

J. L. Washburn and W. D. Bailey, for the appellant.

L. C. Harris and Davis, Hollister & Hicks, for the respondents.

¹⁸⁸ **START, C. J.** The material facts of this case necessary to be here stated are these: John Owens, hereafter designated as the "defendant," was clerk of the district court of the county of St. Louis for four years, his term ending January 2, 1899. Upon assuming the duties of the office, he gave a bond as principal, with his codefendants as sureties, ¹⁸⁹ conditioned for the faithful discharge of his official duties. There was paid to him by his predecessor two thousand seven hundred and eighty-nine dollars and seventy-five cents, which had been paid to the clerk of the court in certain pending condemnation proceedings, pursuant to the provisions of the General Statutes of 1894, section 2649. He accepted the money in his official capacity, and deposited it in the Marine National Bank of Duluth, in his name as clerk of such court. He never obtained any order of the court designating the bank as a depository of such money, nor was any such order ever made. Subsequent to the making of this deposit, and before the court ordered its payment to the party entitled to it, the bank became insolvent, and went into the hands of a receiver in November, 1896. The receiver paid to the defendant sixty-five and one-half per cent of the sum so deposited. The amount so paid he turned over to his successor in office, and no more. Such proceedings were thereafter had in the condemnation proceedings that on February 27, 1900, the court ordered two thousand dollars of the sum originally paid to the defendant to be paid to the plaintiff; but the then clerk, having received only thirteen hundred and ten dollars from the defendant, paid over only that amount, leaving six hundred and ninety dollars unpaid. This balance the plaintiff duly demanded of the defendant, who re-

fused to pay it. Thereupon this action, by leave of the court, was brought upon the defendant's official bond, to recover the balance of the fund which was lost by the failure of the bank. At the time the deposit was made the bank was solvent, and in making it, and permitting it to remain therein, the defendant acted in good faith, and with reasonable care and diligence. The trial court, as a conclusion of law from these facts, directed judgment for the defendants upon the merits. The plaintiff appealed from an order denying its motion for a new trial.

The sole question presented by the record for our decision is whether a clerk of the district court of this state, and the sureties upon his official bond, are liable for money, whether belonging to the public or to individuals, deposited with him in his official capacity, when it is lost without fault or negligence on his part. Or, in other words, is a clerk of the court absolutely liable for funds deposited with him in his official capacity?

The liability of public officers at common law for funds deposited with them was substantially that of a bailee for hire, and they ¹⁰⁰ were not liable for the loss of such funds if it occurred without their fault. This, however, is not the measure of the liability of such officers and the sureties on their official bonds in this state. The question of the liability of public officers for funds deposited with them in their official capacity is one of first importance. The decisions of the courts of the country are not uniform upon the question. A majority of the courts which have passed upon the question hold, upon grounds of public policy, and upon a consideration of the provisions of the statute and the conditions of the official bond in each particular case, to the doctrine of the absolute liability of such officers for the loss of public money received by them in their official capacity. Other able courts, however, have followed the common-law rule. We find it unnecessary to enter upon any general discussion of the question, for this court thirty years ago adopted the rule of absolute liability, and has ever since enforced it. The only doubtful questions in this case are whether, in view of the provisions of the statutes relating to the duties of the clerk of the district court, the rule applies to such officer, and further, if so, whether it extends to private funds deposited with him in legal proceedings.

1. The first question is to be answered by a review of the decisions of this court upon the subject and the reasons therefor. The first case on this subject was *County Commrs. of Hennepin Co. v. Jones*, 18 Minn. 182 (199). It was an action upon a

county treasurer's official bond, conditioned that he "shall . . . safely keep and faithfully pay over according to law all moneys which come into his hands," which were the conditions provided for by statute. The defense was that the funds which the treasurer failed to pay over were stolen from the county safe without any fault on his part; but the court held this to be no defense, for the reason that the treasurer, by reason of the conditions of his bond and the provisions of the statute, was absolutely liable for all public money deposited with him. The court, however, discussed generally the question of the liability of public officers for money deposited with them in their official capacity, as affected by considerations of public policy, and by implication, at least, approved the doctrine of the absolute liability of public officers for public funds, based ¹⁹¹ upon considerations of public policy, as laid down in the case of *United States v. Prescott*, 3 How. 578.

The next case was *County Commrs. of McLeod Co. v. Gilbert*, 19 Minn. 176 (214), which was an action, not upon an official bond, but one to recover from the county treasurer certain taxes which he had collected, and failed to pay over or to account for. The defendant admitted the receipt of the money, and alleged as a defense that it was stolen from the county safe without any neglect or fault on his part. This plea the court, following the *Jones* case, held to be no defense, for the reason that the same degree of responsibility enforced in that case rested upon a county treasurer, independent and outside of his liability upon his official bond. The statute then in force was to the effect that the treasurer should pay over all moneys received by him, and account therefor according to law. The court stated that it had not referred to considerations of public policy, as affecting the responsibility which should be exacted from public officers for money held by them as such, for the reason that it was unnecessary to add anything to what was said on the point in the first case.

The third case was *Board of County Commrs. of Redwood Co. v. Tower*, 28 Minn. 45, 8 N. W. 907, which was an action upon the defendant's official bond as county treasurer, conditioned, as provided by the statutes, for the faithful execution of the duties of his office, and the safekeeping and paying over according to law of all moneys which come into his hands. The alleged breach was that the defendant had failed to pay over certain money belonging to the county. The answer alleged that the money was received on a day named too late to be deposited

in the county depository, and was placed in the county safe, from which it was stolen without any fault of the defendant. The court held that the alleged facts had no tendency to relieve the treasurer from liability, citing the Jones and Gilbert cases, without comment.

Next in order was *Board of Education v. Jewell*, 44 Minn. 427, 20 Am. St. Rep. 586, 46 N. W. 914, which was an action upon the official bond of the defendant, as treasurer of an independent school district, for money received by him, but never paid out by him, nor delivered to his successor in office. The defense was that the money was locked in ¹⁹² an iron safe in his place of business, from which it was stolen by burglars without his fault. The statute then in force (Gen. Stats. 1878, c. 36, sec. 107) relating to the bond and duties of such treasurer required him to execute a bond "conditioned for the faithful discharge of his duties as treasurer." It also declared that the treasurer should receive and pay out upon the order of the board all moneys belonging to the district, and pay to his successor in office, upon demand, all money in his hands belonging to the district. His bond, in addition to the condition required by the statute, also provided that he "shall, at the expiration of his term of office, pay over to his successor in office all moneys remaining in his hands as treasurer." The court held that the fact that the money was stolen from the defendant without his fault, was not a defense to the action. The opinion, by Justice Dickinson, is an able one, and fully discusses the question upon principle and authority, and cites not only the decisions of this court, but the leading cases in other jurisdictions. The conclusion reached was that "where the statute in direct terms, or from its general tenor, imposes the duty to pay over public moneys received and held as such, and no condition limiting that obligation is discoverable in the statute, the obligation thus imposed upon and assumed by the officer will be deemed to be absolute, and the plea that the money has been stolen or lost without his fault does not constitute a defense to an action for its recovery." This conclusion was rested not only upon the terms of the statute and the conditions of the bond, but upon familiar considerations of public policy.

The last case was *State v. Bobleter*, 83 Minn. 479, 86 N. W. 461, which was an action on the defendant's bond as state treasurer for money received in his official capacity, and not paid to his successor, because it had been lost by the failure of certain state depositories in which it was deposited. His bond was con-

ditioned for the faithful discharge of the duties of his office, and the statute imposed upon him the duty of safely keeping the public money, and paying it out as directed by law. This court, approving *United States v. Prescott*, 3 How. 578, expressly recognized and enforced the rule of the absolute liability of public officers for money in their hands as such, for the reason that the statute (Gen. Stats. 1894, sec. 344, subd. 2) providing ¹²³ for state depositaries expressed the purpose not to impair such liability.

The conclusion which we draw from this review of our own decisions is this: It is the settled law of this state that, where a statute, either in direct terms or from its general tenor, imposes the duty upon a public officer to pay over moneys received and held by him in his official capacity, the obligation thus imposed is an absolute one, unless it is limited by the statute imposing the duty or the conditions of his official bond.

This brings us to the question whether the rule applies to a clerk of the district court. Counsel for the defendant concede that it was his official duty as clerk to receive the money in question, and turn it over to his successor, if it had not been lost without his fault. But it is insisted that, to make him an insurer of the fund, he must have contracted to be one, in effect, in his bond, or the statute under which the bond was given must have so provided, and that neither his bond nor the statute imposes upon him the liability of an insurer of the fund.

The statutory condition of the bond of a clerk of the district court is precisely the same as in the bond of the state treasurer and that of the treasurer of an independent school district. The statutory condition in each case is that the officer "shall faithfully discharge his official duties." This does not imply any limitation of the liability imposed by law upon such treasurer or clerk for a failure to discharge any of his official duties. The question, then, is narrowed to the inquiry whether the statute relating to the duties of clerks of the district court, either in direct terms or from its general tenor, imposes upon them the duty to pay over money received by them in their official capacity. The statutory provisions as to the duties of such clerks touching the care and payment of money deposited with them are meager. We have no statute which specifically requires him to pay over such money on the order of the court, or, if no such order is made during his term, then to his successor in office. The clerk of the district court, however, unless a court depositary has been appointed, is, by the settled practise of the court, recognized by

the statute as the official ¹⁹⁴ custodian of all moneys, whether public or private, paid into court, and bound to safely keep them, and pay them out on the order of the court, or deliver them to to his successor. It is provided by the General Statutes of 1894, section 856, that: "Every clerk of the district court, before entering on the duties of his office, shall execute a bond to the board of county commissioners, with two or more sureties, approved by said board, in the penal sum of one thousand dollars, conditioned for the faithful discharge of his official duties, and take and subscribe the oath required by law; which oath and bond shall be filed and recorded in the office of the register of deeds; provided, that the judge of the district court in any county may order all moneys, paid into court to abide the result of any legal proceedings, to be deposited, until the further order of said court, in some duly incorporated bank or banks, to be designated by the court as such depository; or said judge, on application of any person or corporation paying such money into court, may require said clerk to give an additional bond, with like effect as the bond provided for in this section, in such amount as said judge shall deem sufficient. That the clerk of said district court shall be entitled to receive a commission of one per cent on every dollar for receiving and paying over money which may be deposited with him, to wit: One-half of such commission for receiving, and the other half for paying, the same. Said per cent to be paid by the party depositing the money."

Sections 2649 and 2650 of the General Statutes of 1894, provide that in condemnation proceedings the railroad company, if in doubt as to the party entitled to the damages, or any portion thereof, awarded for land taken for its railway, may, upon filing an affidavit to that effect with the clerk of the court in which the proceedings are pending, pay the amount thereof into court, and be released from further liability in the premises. And when the court finally determines to whom the fund belongs, it must be paid upon its order to them. Again, in actions for partition of real estate, if a sale is ordered of the premises, and there is any question as to whom any portion of the proceeds thereof belongs, the clerk of the court must receive, hold, and invest, subject to the order of the court, such portion for the use and benefit of the parties entitled thereto: Gen. Stats. 1894, sec. 5809. So, also, in an action where there are adverse claimants to money which the plaintiff seeks to recover from the defendant, he may pay the amount thereof to the clerk of the court: Laws ¹⁹⁵ 1895, c. 329. A surety on a forfeited recognizance may pay the

amount thereof to the clerk of the court, and be discharged from further liability: Gen. Stats. 1894, sec. 7158. And money accepted by a magistrate in lieu of a recognizance, where the defendant is held to bail to await the action of the grand jury, must, it would seem, be delivered to the clerk of the district court, as a substitute for a recognizance: Gen. Stats. 1894, secs. 7149, 7156.

It is clear from the general tenor of these statutes that they impose upon the clerk of the district court the duty of receiving, keeping, and paying over on the order of the court, or to his successor in office, all money paid into court or to him. We therefore hold that the rule of absolute liability of public officers and the sureties on their official bonds for moneys received by them in their official capacity, as declared and enforced in this court in actions against state, county, and school district treasurers, respectively, applies to clerks of the district court and the sureties on their official bonds.

2. Does this rule extend to private funds—that is, funds received by a public officer by virtue of his office, which are ultimately to be paid by him to private parties? It is urged by counsel for one of the sureties in this case that the rule is limited to strictly public funds, and that in any event the liability of the officer in this case is only that of a bailee for hire. The cases of *People v. Faulkner*, 107 N. Y. 477, 14 N. E. 415, *Wilson v. People*, 19 Colo. 199, 41 Am. St. Rep. 343, 34 Pac. 944, and *Fairchild v. Hedges*, 14 Wash. 117, 44 Pac. 125, tend to support this contention. But, on the other hand, the cases of *Morgan v. Long*, 29 Iowa, 434, *Wright v. Harris*, 31 Iowa, 272, *Havens v. Lathene*, 75 N. C. 505, and *State v. Gatzweiler*, 49 Mo. 17, 8 Am. Rep. 119, do not recognize the distinction claimed. The cases in this court which we have cited do not suggest any distinction between public and private funds. This is not specially significant, for the subject matter of each of those cases was public money.

Upon principle, we are unable to make any distinction between public and private funds in the hands of a public officer, as to his liability therefor. In both cases the funds are paid to the officer in obedience to the mandate of the statute, which makes no distinction between them, and imposes the same duty as to each. The ¹⁹⁶ same bond secures both in the same terms. Can it be true that a county can recover on such a bond the amount of a forfeited recognizance lost by the clerk without his fault, but that money received by him in his official capacity for a pri-

vate party, and so lost, cannot be recovered by an action on the same bond? It is not the character of the fund, but the statute and considerations of public policy, which impose the liability upon the officer. The same considerations of public policy which require that public officers who receive public money be held to a strict measure of responsibility therefor apply just as forcibly to private funds officially received by them, for private property is just as sacred as public property. This is especially true of money paid to the clerk of the district court, as in this case, in condemnation proceedings. The money in such a case is not deposited by its owner. He is not consulted in the premises. On the contrary, his land is taken for a public purpose without his consent, and the money, which is a substitute therefor, is placed in the official custody of the clerk, to be paid to the owner whenever (it may be after years of litigation) the court decides that he is entitled to it. Surely, a wise public policy demands in such a case, if it does in any case, that the official custodian of the money should be held to a strict measure of responsibility therefor. We hold, therefore, that a public officer is liable for the loss of private funds received and held by him in his official capacity whenever he would be liable for the loss of public funds under the same circumstances, for in respect to his liability for the loss of money in his official custody there is no distinction between public and private funds.

It follows that the order herein appealed from must be reversed, and the case remanded with directions to the district court to amend its conclusions of law to the effect that the plaintiff is entitled to recover from the defendants the amount claimed in its complaint, and cause judgment to be entered accordingly. So ordered.

Mr. Justice Lewis Dissented, and after stating that the majority opinion is based upon the principle that "where a statute, either in direct terms or from its general tenor, imposes the duty upon a public officer to pay over moneys received and held by him in his official capacity, the obligation thus imposed is an absolute one, unless it is limited in the statute imposing the duty, or the conditions of his official bond," said that "this proposition is taken from the opinion in Board of Education v. Jewell, 44 Minn. 427, 20 Am. St. Rep. 286, 46 N. W. 914, with the addition of the words 'or the conditions of his official bond.' As I understand the decision in the Jewell case, the court had no intention of extending the liability of the officer and his sureties, unless the statutory provisions expressed obligations greater than those imposed by the common-law

rule. This common-law rule, as shown by the principal case, imposed upon public officers substantially the liability of a bailee for hire as to funds deposited with them, and they are not liable for a loss thereof occurring without their fault.

"In the present case the duties imposed upon the clerk of court with reference to funds coming into his hands are no other or greater than those imposed by the common law, and the mere fact that an inference arises by the general tenor of the statute that he is to pay over such moneys to the proper parties does not change that rule. I have found no case, nor has one been presented, where the strict rule of absolute liability has been applied under a statute similar to the one now involved. In every instance the language corresponded to that already referred to in the cases above reviewed.

"The courts have given different reasons for coming to the same conclusions, and, as in New York, have distinguished between private and public funds; but nowhere, by any court, has the common-law rule been abrogated, in the absence of express provisions either in the statute or bond. In order to hold the officer under consideration absolutely liable, such obligation must rest upon one of two grounds: Either because the statutory provisions referred to abrogated the common-law rule, or that the common-law rule should be abrogated, regardless of the statute, upon considerations of public policy. I do not believe the language of our statute either directly or impliedly extends the common-law test of liability. And I am not prepared to fasten upon this class of officers the strict rule applied by the decision. That degree of responsibility is manifestly unreasonable and unjust when applied to officers whose possession of funds is merely incidental to their official duties, and, whether it shall be so applied, the legislature, not the court, should determine.

"I therefore dissent."

A *Public Officer* becomes an insurer of funds coming into his hands, and not a mere bailee, when he executes a bond binding him to perform the duties of his office: *Estate of Ramsay v. People*, 197 Ill. 572, 90 Am. St. Rep. 177, 64 N. E. 549; *State v. Nevin*, 19 Nev. 162, 3 Am. St. Rep. 873, 7 Pac. 650. The authorities on the question, however, are not uniform. For contrary cases, see *Cumberland v. Pennell*, 69 Me. 357, 31 Am. Rep. 284; *York County v. Watson*, 15 S. C. 1, 40 Am. Rep. 675; and consult the note on this subject to *State v. Harper*, 67 Am. Dec. 365-373.

BENEDICT v. MINNEAPOLIS AND ST. LOUIS RAILROAD COMPANY.

[86 Minn. 224, 90 N. W. 360.]

RAILROADS—Passengers Leaning Out of Car or Riding on Platform.—The voluntary exposure by a passenger of his body, or any part thereof, beyond the sides of a moving railroad train, or the use of the car platform as a place for riding when there is room within the car where his safety is assured, is negligence on his part, barring recovery for any injury resulting therefrom. (p. 348.)

RAILROADS—Passenger on Platform—Negligence.—If a railroad company receives compensation for carrying passengers upon the platforms of its cars because of the overcrowded condition of the latter, it cannot avoid responsibility for an injury to a passenger occupying such platform to which he does not contribute; but if the passenger, while riding on the car platform, extends his body, or some part thereof, beyond the side of the car from curiosity or other unjustifiable cause, his act is negligent, and he cannot recover for an injury resulting therefrom. (p. 349.)

NEGLIGENCE—Youth of Immature Years.—A boy sixteen years of age, traveling alone, is not, because of his youth, incapable in law of exercising sufficient judgment and discretion to avoid incurring the risk of a voluntary exposure of part of his body beyond the sides of a moving railroad train, or to avoid the consequences of any act of culpable negligence. (p. 350.)

T. Canty, for the appellant.

A. E. Clarke, for the respondent.

225 LOVELY, J. Plaintiff, as administratrix, seeks to recover for the death of her son, occurring through the alleged negligence of defendant, who demurs to the complaint upon the ground that it does not state a cause of action. The demurrer was sustained, from which order plaintiff appeals.

The essential facts in the complaint are as follows: During the summer season of 1901 defendant operated trains between Minneapolis and points on Lake Minnetonka. Defendant's passenger station is near the center of the city, and its tracks extend four miles westerly therefrom within the corporate limits. Two-fifths of a mile west of the depot its railroad passes under a bridge on Lyndale avenue. It is claimed that the defendant negligently maintains its tracks so close to the posts which support this bridge that the sides of its cars pass within ten inches of the same. At **226** this time defendant was running suburban trains, and transporting passengers thereon between the city and Lake Minnetonka in each direction, not only

for ordinary purposes, but upon the occasion of picnics and excursions, when the cars would be greatly overcrowded, so that their doors and windows had to be open, and passengers were required to ride upon the platforms and steps at the end of the cars. That the yards of defendant for a mile west of the depot had switches and side tracks adjacent to its main tracks, and at various points within this distance such tracks were crossed by street bridges overhead, supported by iron posts erected in the yard at the sides of the tracks. That these bridges resemble each other, and look alike to passengers. That the depot is east of and very close to one of the bridges, so that when trains arrive from the west they stop partly under it for passengers to alight. That the conductors and brakemen of the train announce the stations as the trains slow up and stop at various points under the bridges, when the passengers frequently and usually lean out from the platforms of the cars and look ahead to see if their train has arrived at its destination, which is their usual and customary habit and known to defendant. On June 30, 1901, plaintiff's intestate, a minor, of the age of sixteen years, was a passenger on one of these trains coming to the city from Lake Minnetonka. That this train was overcrowded with passengers returning from a picnic. That many drunken and disorderly persons were riding thereon, whereby intestate was compelled to stand upon the platform of his car. The train suddenly slowed up near the Lyndale avenue bridge, when he, with the consent of the defendant, and without any warning of the danger (or knowledge of the bridge), leaned out slightly, and looked ahead, to see if it was arriving or had arrived at its destination, when his head immediately came into collision with one of the iron posts referred to, and he received the injuries from which he died.

The position of the defendant in support of the order of the trial court is that intestate, by extending his person beyond the line of the car while in motion, committed an act of negligence, which was the proximate cause of his injury, and, therefore, precludes recovery.

227 The law undoubtedly enjoins upon the railway carrier of passengers extraordinary diligence. This rule is intended, for reasons of public policy, to secure their safe carriage, so far as human skill and foresight can accomplish that result: *Smith v. St. Paul City Ry. Co.*, 32 Minn. 1, 50 Am. Rep. 550, 18 N. W. 827. However, railways must construct and arrange their tracks and yards to attain practical purposes in the operation of

their roads. They have been permitted, without restraint from police regulation, to build tracks with switches, when necessary, in close proximity to each other. This course is unavoidable in city yards, where the right of eminent domain, in view of public as well as private interests, has restricted the appropriation of land for railroad uses. A common incident of city yards are overhead bridges, with posts to sustain them, as well as adjacent tracks upon which trains are continually passing so near to each other that a slight extension of the human body beyond the sides of a car is fraught with danger to life and limb. These conditions have always existed. They are customary, and to a large extent indispensable; hence the high degree of duty to patrons exacted of carriers of passengers has been generally regarded as fulfilled with reference to outside arrangements at such places where a safe and secure place has been provided within its cars for their occupation. Having done this, the carrier is not required, in maintaining adjoining structures, to guard against the anticipated carelessness of those who are in no danger so long as they remain in the place of safety which the carrier has furnished. The customary methods of constructing tracks, building bridges, and running trains in railroad yards render any exposure of a person beyond the car line imminently hazardous; hence there must arise a presumption in behalf of the carrier, when injury arises from such exposure, that the conduct of its business in this respect is not negligent, and imposes upon the injured party the burden of showing that it was otherwise in any particular case. While, as a general rule, it may be said that railroads can arrange structures adjoining their tracks to accomplish practical ends, even though the maintenance of the same is dangerous to those who are themselves reckless, yet it cannot be said either that an unnecessary or useless act by the railroad in ²²⁸ this regard would not be negligent as to an employé required to work in the yards, or even a passenger, whose person through no fault of his own, as by extraneous force, impending danger, sudden emergency, or other unavoidable cause, would be exposed to danger.

Subject to the qualifications above stated, the courts have not been able to impose upon railway carriers burdens so unreasonable that they could not be fulfilled, nor have passengers been relieved from the exercise of restraint from the curiosity which prompts them to expose their persons to the imminent risk of collision with objects outside of cars. Car windows and doors are for the admission of light and air, not to enable passengers

to pursue a course which general experience declares to be extremely hazardous. The proper use of platforms is to afford travelers a safe and convenient means of entrance and exit to and from the cars when not in motion. But it follows, in view of the conditions above stated, that the voluntary exposure of the body beyond the sides of a moving train, or the improper use of the platform when safety is assured within the car, must be regarded as reckless, and the almost inevitable disaster that follows remediless. These conclusions are supported by the great weight of authority in this country: *Beach on Contributory Negligence*, 2d ed., sec. 155; *Todd v. Old Colony R. R. Co.*, 3 Allen, 18, 80 Am. Dec. 49; 7 Allen, 207, 83 Am. Dec. 679; *Pittsburg etc. R. R. Co. v. McClurg*, 56 Pa. St. 294; *Indianapolis etc. R. R. Co. v. Rutherford*, 29 Ind. 82, 92 Am. Dec. 336; *Favre v. Louisville etc. R. R. Co.*, 91 Ky. 541, 16 S. W. 370; *Georgia Pacific Ry. Co. v. Underwood*, 90 Ala. 49, 24 Am. St. Rep. 756, 8 South. 116; *Moakler v. Willamette etc. Ry. Co.*, 18 Or. 189, 17 Am. St. Rep. 717, 22 Pac. 948; *Carrico v. West Virginia etc. Ry. Co.*, 35 W. Va. 389, 14 S. E. 12; *Richmond etc. Ry. Co. v. Scott*, 88 Va. 958, 14 S. E. 763; *Scheiber v. Chicago etc. Ry. Co.*, 61 Minn. 499, 63 N. W. 1034.

In a large measure the learned counsel for appellant concedes the rule as laid down in the cases cited. We quote from his thorough and exhaustive brief as follows: "I concede that, as a general rule, a passenger who stands on the platform, or protrudes his head out of the window or outside of the outer line of the car, on a rapidly moving train on an ordinary steam railroad, under ordinary circumstances, and is thereby injured, is guilty of contributory negligence as a matter of law."

But it is urged that this complaint discloses exceptional circumstances, which take this case out of the general rule. These exceptions are: The moderate speed of the train; its frequent stops; the misleading appearance of the overhead bridges, calculated to provoke inquiry; the knowledge by defendant of the habit of passengers to put their heads out of the windows of the cars at such places; the omission to give warnings forbidding such acts; the overcrowded condition of the cars, with the incidental necessity of passengers riding on platforms, permitted by the defendant; as well as the immature age of the deceased—which it is claimed relieve intestate from the imputation of recklessness.

We are unable to give force to the view that the speed of the train is of significance, for it was moving with sufficient rapid-

ity to make the exposure of any part of the body dangerous, as the unfortunate accident in this case demonstrates. The misleading appearance of the overhead bridges may have excited curiosity, but cannot justify a dangerous exposure, which was not necessary, particularly as defendant was required to announce the stations when reached, and this legal duty was admittedly performed; hence we cannot hold that curiosity alone can furnish an excuse for negligent self-exposure in such cases.

The allegation of the custom of passengers to extend their heads beyond the sides of the car with the knowledge and consent of defendant, it is claimed, required warnings of the danger incurred thereby. These facts undoubtedly charged a reckless habit of the passengers thus exposing themselves. The general rule denying liability when accidents occur in such cases rests upon the ground that such conduct is so hazardous within the range of common experience that all travelers must and should have knowledge thereof, and that dangers from such causes should be so well known and anticipated that specific warning ought not to be required, and would be useless if given. These considerations have all been carefully weighed and answered in the evolution of the rule forbidding unnecessary exposure of their persons by travelers on railways in the cases cited above, and have not been considered sufficient to modify its force, so as to be the subject of innovation in this respect. The fact that the train on which intestate was a passenger ²³⁰ was one among other suburban trains, and that such trains were habitually overcrowded by passengers who were permitted and required to ride on the platforms with the knowledge and consent of the defendant, may well have excused intestate in choosing the place he occupied when injured.

If railway companies subject their trains to the same uses adopted on urban electric or trolley cars, and receive compensation for carrying passengers upon the platforms of the same, they cannot avoid responsibility for an injury arising merely from the occupation of such places by their patrons to which the injured party does not contribute: *Reem v. St. Paul City Ry. Co.*, 77 Minn. 503, 80 N. W. 638. Had intestate fallen from the train by reason of its being overcrowded, or had he been pushed therefrom by causes attributable to the dangerous course of conduct pursued by defendant in allowing passengers to ride on its platforms, we could not hold that intestate's conduct was negligent; but the complaint rests plaintiff's right to recover upon the expressed ground that the accident resulted

from the action of intestate himself. It is alleged therein that at the inopportune moment he then leaned out slightly and looked ahead as said train moved along, to see if it was arriving or had arrived at its destination. This averment repels the inference that the efficient cause of the accident was the overcrowding of the train; and, while his position on the platform may be excused by the course of defendant, it was the voluntary act of the unfortunate youth himself, wherein he exercised his own judgment, and took chances, which resulted in his death. Under the admissions of the plaintiff, her son's conduct can no more excuse him from negligence than in the case of a passenger within the car, who protrudes his head from a window and is struck by a passing train.

It remains to consider whether the immature age of intestate would, as a matter of law, demand a submission to a jury of the question of his capacity to appreciate the risks incurred. The allegation in the complaint in this respect is that he "was sixteen years of age." There are no facts alleged to show lack of intelligence, discretion, or ability ordinarily exercised by persons of that age. The rule of care imposed upon persons of immature years ²³¹ has been stated in a former decision of this court in the following language: "The law very properly holds that a child of such tender years as to be incapable of exercising judgment and discretion cannot be charged with contributory negligence; but this principle cannot be applied as a rule of law to all children, without regard to their age or mental capacity. Children may be liable for their torts or punished for their crimes, and they may be guilty of negligence as well as adults. The law very humanely does not require the same degree of care on the part of a child as of a person of mature years, but he is responsible for the exercise of such care and vigilance as may reasonably be expected of one of his age and capacity, and the want of that degree of care is negligence": *Twist v. Winona etc. Ry. Co.*, 39 Minn. 164, 168, 12 Am. St. Rep. 626, 39 N. W. 402. See, also, *Ludwig v. Pillsbury*, 35 Minn. 256, 28 N. W. 505; *Powers v. Chicago etc. Ry. Co.*, 57 Minn. 332, 59 N. W. 307; *Tucker v. New York etc. R. R. Co.*, 124 N. Y. 308, 21 Am. St. Rep. 670, 26 N. E. 916; *Masser v. Chicago etc. Ry. Co.*, 68 Iowa, 602, 27 N. W. 776. The general rule that it is for the jury to determine the capacity of a minor to exercise discretion and judgment, and whether the failure to do so is contributory negligence, cannot reasonably be applied in cases where such persons are infants only in legal theory. An infant at fourteen

years, under the policy of our law, has sufficient discretion to select a guardian (Gen. Stats. 1894, sec. 4535), and is capable of malice which would subject him to penal consequences for crime when above the age of twelve: Gen. Stats. 1894, sec. 6301. It would seem to follow that the mere fact alone that the infant is above that age, though under twenty-one, would not presumptively absolve him from the consequence of contributory negligence. While an infant over twelve years might not have sufficient capacity to appreciate the risk of a dangerous situation, owing to peculiar individual characteristics affecting his capacity, yet we are unable to hold that a youth sixteen years of age, traveling alone on a railway train, is not, as a matter of law, endowed with sufficient intelligence and discretion to avoid the consequences of acts which the law considers culpably negligent: Patterson on Railway Accident Law, sec. 7; Nable v. Allegheny, 88 Pa. St. 35, 32 Am. Rep. 413; Deitrich v. Baltimore etc. Ry. Co., 58 Md. 347.

The order appealed from is affirmed.

For a Passenger to Ride upon the Platform of a railway car is not negligence per se. If he is compelled to ride there by reason of insufficient accommodations, the railway company is answerable for injuries received by him while thus riding, unless he is guilty of contributory negligence. Whether he is so guilty is a question for the jury. Generally speaking, however, he takes upon himself the risks of his position, if there is room for him inside: Graham v. McNeill, 20 Wash. 466, 55 Pac. 631, 72 Am. St. Rep. 121, and cases cited in the cross-reference note thereto; Woodroffe v. Roxborough etc. Ry. Co., 201 Pa. St. 521, 51 Atl. 324, 88 Am. St. Rep. 827, and cases cited in the cross-reference note thereto.

STATE v. ZIMMERMAN.

[86 Minn. 353, 90 N. W. 783.]

MUNICIPAL CORPORATIONS—Public Health—Construction of Powers Conferred.—Powers conferred by statute upon municipalities or boards of health to secure the preservation of the public health, and to provide for the enforcement of all proper and necessary sanitary regulations, and for the summary suppression of all conditions detrimental to the lives and health of the people, should, notwithstanding the individual liberty of the citizen is in a large measure involved, receive a broad and liberal construction in aid of the beneficial purposes of their enactment. (p. 354.)

MUNICIPAL CORPORATIONS—Vaccination.—A broad and comprehensive delegation of power by statute to municipalities or

health boards to do all acts and make all regulations for the preservation of the public health as are deemed expedient, confers upon the proper authorities power to make and enforce a regulation that in cases of emergency caused by an epidemic of smallpox, all children shall be required to be vaccinated as a condition precedent to their admission to the public schools. (p. 356.)

MUNICIPAL CORPORATIONS—Charters of.—The various and proper provisions of a municipal charter, legally framed, enacted and adopted by a city, have all the force and effect of legislative enactments, and may properly include provisions relating to the preservation of the public health. (p. 356.)

F. A. Pike, for the appellant.

J. E. Markham, F. H. Griggs, and T. McDermott, for the respondents.

354 BROWN, J. Mandamus to compel respondents, who are members of the board of school inspectors for the city of St. Paul, to admit Edith Freeman, a child eight years of age, and a resident of that city, to the public schools of said city. She was refused admission because of the fact that she had not complied with certain regulations of the board requiring pupils to be vaccinated. Respondents had judgment in the court below, and relator appeals.

The cause came on for trial in the court below upon the allegations contained in the writ and respondents' answer. The trial court submitted three questions to a jury, namely: "1. Was there in the month of January, 1901, an epidemic of smallpox in St. Paul, or the territory tributary thereto, or was there at that time danger to the public health from the existence and threatened spread of such disease? 2. Is vaccination a preventive of, or does it materially assist in preventing, the disease of smallpox or the spread of such disease? 3. Under the conditions as they existed in January, 1901, was it a reasonable regulation to require children attending the public schools of the city of St. Paul to have been vaccinated within five years?" The jury answered each question in the affirmative.

355 The question whether the public authorities may require the vaccination of children, as a condition precedent to their right to attend public schools, has been much discussed by the courts. The authorities are not uniform on the subject. By some courts it is held that the power exists and may be exercised without regard to the existence of an emergency occasioned by an epidemic of smallpox; other authorities limit the right to exercise the power, whether expressly conferred by legislative enactment or not, to the presence of an epidemic, and when there

is imminent danger of the disease spreading among the people of the community; and by still other courts that, even without legislative authority, health officers possess the power to impose such conditions, and may enforce them in cases of emergency amounting to "an overruling necessity." An interesting discussion of the subject may be found in 4 Law Notes, 224.

But whatever may be the correct rule to apply to controversies of this kind, if the power may be exercised under any circumstances, where legislative authority has been granted, it should be where, as in the case at bar, there is an epidemic of smallpox, and imminent danger of its spreading. The courts are not concerned with the question of the efficacy of this treatment, nor with considerations relative to its necessity and propriety as a police regulation, except, perhaps, in those cases where an abuse of power is pleaded and shown. The treatment may be, as claimed by some, a gross interference with individual liberty, or, as claimed by others, a certain preventive of a much dreaded disease, and the spread of the same, and therefore a great public benefactor. We are not to be understood as expressing an opinion upon the merits of the treatment. It was said by the supreme court of the state of Indiana that "the question is one which the legislature or boards of health, in the exercise of the powers conferred upon them, must in the first instance determine, as the law affords no means for the question to be subjected to a judicial inquiry or determination": *Blue v. Beach*, 155 Ind. 121, 127, 80 Am. St. Rep. 195, 56 N. E. 89. This is in line with the general rule that the exercise of the police power is a matter resting in the discretion of the legislature, or the board or tribunal to which the power is delegated, in the exercise of ³⁵⁶ which power the courts will not interfere, except where the regulations adopted for that purpose are arbitrary, oppressive, and unreasonable: *State v. Barge*, 82 Minn. 256, 84 N. W. 911; *Northwestern Tel. Exch. Co. v. City of Minneapolis*, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69; 18 Am. & Eng. Ency. of Law, 1st ed., 746.

But these suggestions are only incidental, and of no particular importance. Counsel for relator does not contend that the subject is not within the control of the legislature, and may not be delegated to municipal authorities. His main contention, and upon which he relies for reversal, is that the legislature of the state has never conferred the power upon the board of education, the common council, or the health officers of the city of St. Paul, and, further, if it be shown that authority has been so

conferred, that it does not appear ever to have been put into operation by them, and was not acted on by respondents in this case. Whether such authority has been conferred is the principal question in the case.

We may adopt for present purposes the rule that the power to enforce vaccination, as a condition to the right of admission to the public schools, may be exercised by local authorities in cases of emergency only, and not then unless expressly or by fair implication conferred upon them by the legislature; and, if that power be found wanting in this case, a reversal must follow. That there was an emergency prompting the action of respondents in this case, and that vaccination is effective for the purposes claimed for it, and that to require all children to be vaccinated was a proper and reasonable regulation, are questions which not only the local authorities have determined, but which the verdict of the jury affirms. It remains to inquire whether the power existed, and whether the proceedings complained of were founded thereon. The basis of the authority, whether exercised directly by the legislature, or through local officers, is the police power. This the legislature may in all cases itself exercise in the interests of the public health and welfare, or delegate to municipal authorities and inferior boards and tribunals. There is no claim that the legislature itself has ever imposed vaccination as a condition precedent to the right of children to attend the public schools of St. Paul, and we turn at once to the question whether the authority to enforce such ³⁵⁷ a regulation has ever been delegated to the authorities of that city.

The authority of boards of health legally organized in cities and villages of this state, or other bodies designated to act as boards of health, is prescribed, as a rule, by general enactments of the legislature, or by municipal charters. Power is usually conferred in ample measure to secure the preservation of public health, and to provide for the enforcement of all proper and necessary sanitary regulations, and for the summary suppression of all conditions detrimental to the lives and health of the people. In view of the importance of the interests confided to the care of health officers, the various statutes conferring such powers should, notwithstanding the individual liberty of the citizens is in a large measure involved, receive a broad and liberal construction in aid of the beneficial purposes of their enactment: Parker & Worthington on Law of Public Health, sec. 79. And the courts should be cautious

in declaring any curtailment of their authority, except upon clear grounds: *Gregory v. City of New York*, 40 N. Y. 273. With this rule in mind, we shall consider some of the sections of the statutes which are relied upon to confer the authority exercised in this case.

Section 7048 of the General Statutes of 1894 provides, among other things, that all villages and cities in the state shall have a board of health, to be chosen and consist of the number as therein designated, "anything in the charter of any such village, borough or city, to the contrary notwithstanding." It also provides that such boards shall within their respective villages and cities "have and exercise all the powers necessary for the preservation of the public health," and they are authorized to make such rules and regulations as may be deemed necessary for the health and safety of the inhabitants, and, further, that any person who shall violate any such regulation shall be deemed guilty of a misdemeanor. Section 7045 provides: "Whenever any part of this state appears to be threatened with, or is affected by, any epidemic or infectious disease, the state board of health may make, and from time to time alter and revoke regulations for all or any of the following, among other purposes: Guarding against the spread of disease by quarantine or exclusion of any infected persons; and may by order declare all or any of the regulations so made to be in force within the whole or any part or parts of the district of any local board of health in this state."

§§§ Section 7047 provides: "The local board of health of any district or districts within which, or part of which, regulations so issued by the state board of health are declared to be in force, shall superintend and see to the execution thereof, and do and provide all such acts, matters and things as may be necessary for mitigating or preventing the spread of any such disease."

The provisions of the last two sections cited are of no special importance, for it is not claimed that the state board of health took any part in the proceedings here in question, but they tend in a general way to show an intention on the part of the legislature to clothe all boards of health with general supervisory powers in matters pertaining to the public health and sanitary conditions.

It will be noted that none of the provisions of the statutes just quoted expressly authorizes municipal authorities or health officers to require children to be vaccinated, as a condition precedent to their admission to the public schools; yet we

have no hesitation in holding (giving the several provisions referred to a broad and liberal construction) that the legislature intended to confer such power upon them. A broad and comprehensive delegation of power to do all acts and make all regulations for the preservation of the public health as are deemed expedient confers, by fair implication, at least, the power sought to be exercised in this case. In the case of *In re Rebenack*, 62 Mo. App. 8, a legislative grant of power to a school board "to make all rules, ordinances, and statutes proper for the government and management of such schools" was held sufficient authority for a regulation requiring children to be vaccinated, as a condition to their right to attend school. A general grant of power to do all acts necessary for the preservation of the public health and welfare was held to authorize a similar regulation in *Indiana: Blue v. Beach*, 155 Ind. 121, 127, 80 Am. St. Rep. 195, 56 N. E. 89. The same conclusion was reached in *Hazen v. Strong*, 2 Vt. 427, and in *Duffield v. Williamsport*, 162 Pa. St. 476, 29 Atl. 742.

But the necessary power and authority to support the action of respondents is not dependent alone on the general statutes cited. The charter of the city of St. Paul confers ample power to that end in definite and explicit terms. This charter was enacted by the ~~359~~ citizens under and pursuant to constitutional and legislative authority, and it was within their power to include as a subject matter thereof provisions relating to a health department. Such a department very properly belongs and is incident to the government of municipalities (*State v. O'Connor*, 81 Minn. 79, 83 N. W. 498), and the provisions of the charter, of which we are required to take judicial notice (*Laws 1899, c. 351*), have all the force and effect of legislative enactments.

This charter provides for and creates a health department for the city, designating certain officers as members of that department. By section 2, chapter 10, the office of commissioner of health is created; and the occupant of that position is made the head of the department, and is clothed with the management and control of all matters and things pertaining thereto. By section 25 of the same chapter the commissioner is empowered to make such rules and regulations for the government or health of the city as he may, from time to time, deem necessary and expedient. Section 9 makes it his duty to enforce all the laws of the state and ordinances of the city relating to sanitary regulations, and to cause all nuisances to be abated with reasonable promptness. Section 15 provides that in case

of pestilence or epidemic disease, or of danger of impending pestilence, it shall be the duty of the commissioner to take such measures, and to do and order, and cause to be done, for the preservation of the public health as he may in good faith deem the public safety to demand. By section 16 he is expressly required to take such measures as may be deemed necessary to prevent the spread of smallpox, by requiring all persons in the city not vaccinated to be vaccinated within such time as he shall prescribe. Section 33 authorizes him to require a certificate of vaccination as a condition to the admission of children to the public schools. The authority thus granted and the duties imposed are ample to sustain the commissioner of health in the regulation ordered enforced in this instance, if the general statutory provisions be insufficient.

It is further contended that the proceedings complained of were not founded on any valid regulation authorizing them. That the commissioner acted and made an order or regulation requiring all ^{and} children of school age to be vaccinated, as a condition precedent to their admission to the public schools, is not disputed. It is urged, however, that as he assumed to act under and by authority of an ordinance of the city of St. Paul, his order was a nullity, because of the invalidity of the ordinance, and, further, that as the ordinance was not admitted in evidence on the trial below, it is not now before this court. We do not find in the charter any provision requiring the board of health to authorize previously, or subsequently affirm, any act that may be deemed necessary to be taken by the commissioner for the preservation of the public health. The provisions of the charter in respect to the express duties imposed upon that officer are self-executing, requiring no action on the part of the board of health or city council to authorize the performance of the same. He is made the executive officer of the health department, and is required to perform the several acts and duties specified, without reference to any action taken by the board. It is not controlling that he assumed to proceed by authority of an ordinance, for the warrant justifying the regulation made by him is found in the provisions of the statutes and the charter we have quoted. Had he stated in the order that it was founded on a regulation of the police department, it would have been none the less valid and enforceable.

In addition to the rule or order of the commissioner, it appears that the school board had previously enacted a by-law

or rule directly covering the subject. This rule provides, among other things, that a pupil applying for admission for the first time to the public schools must be accompanied by a parent or guardian, who shall give satisfactory evidence that the child has been vaccinated within five years. This rule was enacted a number of years ago, and it is contended by relator that it is void because arbitrary and unreasonable, and not enacted in the presence of an epidemic of smallpox. Whether this is so or not, we need not determine. The commissioner of health did not act by its authority, and the existence of the rule is not necessary to the validity of his order. In addition to this rule, however, the school board expressly acquiesced in the order of the commissioner, and directed the principals of the several city schools to ³⁶¹ obey and follow its instructions; and, if affirmative action on their part was at all essential to the validity of the action taken by the commissioner, this act on the part of the board answered that purpose. From all this it must follow—and there is no escape from the conclusion—that the proceedings complained of on the part of respondents were fully authorized by law.

It is very true that the statutes of our state provide that admission to the public schools shall be free to all persons of a defined age and residence, and that every parent having control of any child of school age is expressly required to send such child to school, and that all teachers are required to receive them, and that, if any child of school age is denied admission or suspended or expelled without sufficient cause, the board or other officers may be fined. But all these statutory provisions must be construed in connection with, and subordinate to, the statutes on the subject of the preservation of the public health and the prevention of the spread of contagious disease. The welfare of the many is superior to that of the few, and, as the regulations compelling vaccination are intended and enforced solely for the public good, the rights conferred thereby are primary and superior to the rights of any pupil to attend the public schools.

Our conclusions are in harmony with those reached by the learned trial judge, and the order appealed from is affirmed.

The Power of Boards of Health to make the vaccination of children compulsory, when such authority is not expressly conferred by statute, is considered in the monographic note to *Blue v. Beach*, 80 Am. St. Rep. 230, 231, on what powers may be delegated to boards of public health.

ENGSTRAND v. KLEFFMAN.

[86 Minn. 403, 90 N. W. 1054.]

EVIDENCE.—It is Presumed that the Common Law is the same in the several states of the Union. (p. 360.)

JUDGMENTS Void as to One Whether Void as to All.—At common law a judgment in an action ex delicto, against two or more defendants jointly and severally liable, though void as to one of them for want of jurisdiction, is not necessarily void as to the other or others. (p. 361.)

J. H. Norton and W. H. Smallwood, for the appellant.

J. J. Skuse and H. G. Gearhart, for the respondent.

403 BROWN, J. Action to recover upon a foreign judgment. Plaintiff had judgment in the court below, and defendant Edward Kleffman appealed from an order denying a new trial.

The facts are as follows: Heretofore plaintiff brought an action **404** against defendants in the circuit court of the state of Wisconsin to recover damages for an alleged fraud committed by them in a transaction had between the parties which resulted in a sale of certain real property to plaintiff, which defendants falsely represented they owned. The summons therein was served upon this appellant, but not upon his codefendant. Appellant appeared and answered, and proceedings in the action resulted in a judgment for plaintiff against both defendants for the sum of about one thousand dollars. The defendant not served with summons made no appearance whatever, nor was he represented in that court on the trial of the action. Subsequently this action was brought in this state to recover upon the judgment, and the summons was served upon both defendants. They both appeared in the action, and defendant John Kleffman, who was not served with summons in the Wisconsin action, answered, setting up the want of service, that he did not appear in that action, and that the Wisconsin court had no jurisdiction to render the judgment against him. The trial court found this defense to be true, and ordered judgment in his favor, but against appellant, who was served with summons in the Wisconsin action.

It is contended on the part of appellant that the judgment sued upon, being void as to one of the defendants, was void as to both, and that the court below erred in ordering judg-

ment against him. This is practically the only question in the case, and, as the statutes of the state of Wisconsin on the subject are not shown, we are guided in its determination by the rules of the common law, which, in the absence of proof to the contrary, is presumed to be the same in the several states: *Crandall v. Great Northern Ry. Co.*, 83 Minn. 190, 85 Am. St. Rep. 458, 86 N. W. 10.

Many authorities are found in the books bearing upon the question, but they are not uniform or harmonious, at least as respects actions founded upon contract liability. Some cases hold that in an action upon a joint, or a joint and several, liability, a judgment given against all the defendants, if void as to one of them, either for want of jurisdiction or other cause, is void as to all. Other cases hold to that rule only in actions founded on a joint liability, and still others hold that such a judgment is not void ⁴⁰⁵ where the cause of action was joint and several: 1 Black on Judgments, secs. 210, 211. But the cases referred to were all in actions *ex contractu*, and whatever may be the correct rule as to judgments in actions of that sort—whether upon joint or joint and several liability—the principles there announced can have no controlling application in actions *ex delicto*. The latter are, according to the rules of the common law, joint and several, and a judgment against one of several wrongdoers is not a bar to an action against others; and so far as we have been able to discover, the rule that a judgment on a joint contract obligation, if void as to one of the several defendants jointly liable, is void as to all, has never been applied to actions of that kind: 11 Ency. of Pl. & Pr. 852; *Elliot v. Porter*, 5 Dana, 299, 30 Am. Dec. 689; *Sessions v. Johnson*, 95 U. S. 347; *Fleming v. McDonald*, 50 Ind. 278, 19 Am. Rep. 711; *Preston v. Hutchinson*, 29 Vt. 144; *Kirkwood v. Miller*, 5 Sneed, 455, 73 Am. Dec. 134, and note.

The reasoning of the cases holding such a judgment void in actions *ex contractu*, where there is a joint liability, is not only that the cause of action is merged in the judgment, but the parties liable thereon have the right of contribution, which right the plaintiff is bound to respect, and is not permitted to take any action or step that would deprive any of the defendants of the benefits to accrue therefrom. If one defendant thus jointly liable is compelled to pay the entire judgment, he has recourse against his codefendants for reimbursement; and if the judgment be void as to any such defendant, the

defendant thus compelled to pay the whole debt is deprived of that remedy, for nothing remains upon which to base proceedings to enforce it, the cause of action being merged in the judgment, which is, in turn, canceled and discharged by payment. But this reasoning, conceding its soundness to the full extent, can have no application in actions in tort, where the liability of the wrongdoers is joint and several, at the election of plaintiff, and the entry of judgment against any one of the wrongdoers does not extinguish the cause of action, except as to the defendant against whom rendered; nor, in cases like that at bar, where the wrong complained of was intentional, is there any right of contribution—at least none which the injured party is under any duty or obligation to respect—as there is in ⁴⁰⁶ cases where there is a joint, or joint and several, contract liability. The law on this subject is stated in 2 Black on Judgments, section 777, and 11 Encyclopedia of Pleading and Practice, 852, where many of the authorities are collected and discussed; and, as to actions founded on contract liability, 1 Black on Judgments, sections 210, 211. See, also, 7 Am. & Eng. Ency. of Law, 364; *Ankeny v. Moffett*, 37 Minn. 109, 33 N. W. 320.

That the cause of action on which the judgment in question was rendered was one sounding in tort, there is no question. The action was, as we have already suggested, one to recover damages for the fraud of defendants in the matter of the sale of certain real property. While this does not appear upon the face of the judgment, it does appear from the complaint in that action, and to that the court may look in determining the nature of the action: *McIntyre v. Moore*, 105 Ga. 112, 31 S. E. 144.

It is urged by appellant that, because the complaint in the Wisconsin action did not allege that defendants knew that their representations were false, it must be assumed that the action was for the breach of a warranty of title, and not for fraud. A reading of the complaint does not sustain this contention. The complaint alleges that defendants, "for the purpose of inducing plaintiffs to purchase" certain lands, "and for the purpose of deceiving and defrauding them, falsely and fraudulently represented to said plaintiffs, . . . and said representations . . . were entirely false and untrue." This sufficiently alleges the scienter—the intent to deceive and defraud.

The further point is made that the complaint contains no allegation that a judgment void as to one of the defendants is

valid under the laws of the state of Wisconsin. In determining whether it is valid, we are controlled by the common-law rule already referred to. By that, such judgment is valid and binding against the defendant served with process, even though it may be void as to a codefendant not served. In addition to this, it was conceded on the trial that the circuit court of Wisconsin, in which the judgment in question was rendered, was a court of general jurisdiction. The validity of the judgment must therefore be presumed.

Order affirmed.

ENTIRETY OF JUDGMENTS VOID AS AGAINST SOME OF THE PARTIES.

- I. Void as to One, Whether Void as to All.
- II. Jurisdictions, Where Held Void in Toto.
- III. Jurisdictions Where Held Valid as to Defendant Served.
- IV. Disposition Upon Appeal.
- V. Conclusion.

I. Void as to One, Whether Void as to All.

We think it may be safely asserted that the weight of authority is against the doctrine that a judgment irregularly or mistakenly rendered against two joint defendants, one of whom is not summoned, or over whom the court has no jurisdiction, and allowed to stand unreversed, though void as to the defendant over whom the court rendering it has no jurisdiction, is necessarily void as to the summoned defendant. In most states, there are statutes authorizing judgments against two or more joint debtors upon service of summons on but one of them, but the discussion of the entirety of the judgment may more profitably be confined to cases of judgments irregularly rendered, and without statutory sanction.

Upon this topic the cases are in irreconcilable conflict, and quite a respectable line of authority asserts and enforces the proposition that a judgment is an entirety, and if void as against one defendant, it is void as against all, though it remains unappealed from and unreversed. This doctrine is based upon numerous expressions found in the authorities to the effect that a judgment is an entirety, and if rendered against several defendants jointly, and erroneous or irregular as to one of them, it cannot be purged thereof so as to stand good and valid against the remainder.

II. Jurisdictions Where Held Void in Toto.

It is held, accordingly, in quite a number of the states, that if the judgment is void as against one defendant for want of jurisdiction over him, or for other valid cause, it must be considered as void as to all of the defendants, and therefore a mere nullity. The rule probably originated, so far as the United States is concerned, in a

careless and ill-considered expression emanating from a very distinguished court in the case of *Hall v. Williams*, 6 Pick. 232, 17 Am. Dec. 356, wherein it was said that "the judgment being entire, if it is a nullity with respect to one, it is also in the whole."

This case, like many of its successors sustaining the same proposition, was a suit on a judgment recovered in another state in which one or more of the joint defendants was not served with process, and neither had notice nor appeared in the original action. This rule arising from a dictum, that the judgment is entire, and if void as to one defendant, where there are several, it is void as to all, may be said to be the settled doctrine in Massachusetts, as it is announced and upheld in *Knapp v. Abell*, 10 Allen, 485, and *Wright v. Andrews*, 130 Mass. 149. In several of the states the courts have adopted this rule upon the authority of *Hall v. Williams*, 6 Pick. 232, 17 Am. Dec. 356, without discussion or reasoning. Thus, in New Hampshire, it is settled that a joint judgment against several defendants is an entirety, and if void as to one for want of notice, it is void as to all: *Rangely v. Webster*, 11 N. H. 299; *Wilbur v. Abbot*, 60 N. H. 40. In Maine, the same rule prevails, it being held that a judgment against two defendants jointly is one and entire, and is void against both if one was not an inhabitant of the state, and no legal service of the writ was made upon him: *Buffum v. Ramsdell*, 55 Me. 252, 92 Am. Dec. 589; *Winalow v. Lambard*, 57 Me. 357. In the comparatively recent case of *Hanley v. Donoghue*, 52 Md. 239, 43 Am. Rep. 554, decided in 1882, the question was presented for the first time to the supreme court of Maryland for its determination, and that court decided that in an action on a judgment recovered in another state against two defendants jointly, only one of whom was served with process, there can be no recovery, even against the one served, and the court said that "if a suit is brought in this state on a foreign judgment, which is admitted to be void as to some of the defendants, such a judgment must be held void as to all. The reason of the law is that the judgment is an entire thing, and cannot be separated into parts. If execution is issued upon such a judgment, it must be issued against all of the defendants. . . . Courts have permitted judgments, on motion, some of them in a quasi equitable jurisdiction, to be set aside as to one defendant and to stand as to others. And in some states it has been decided that a judgment may be valid as to one defendant and void as to others: *Douglass v. Massie*, 16 Ohio, 271, 47 Am. Dec. 375. The weight of authority is, we think, decidedly the other way, and in accord with the law as laid down in *Hall v. Williams*, 6 Pick. 232, 17 Am. Dec. 356. Looking at the question from an equitable standpoint purely, there is some force in the appellants' contention that a judgment may, and ought to be, held valid as to parties summoned, and who had an opportunity to make their defenses, even though it may be void as to others, against whom no

process was issued. But if it be well settled—and such seems to be the law—that a judgment which is void as to one of the defendants is void also as to the others, the plaintiff in taking such a judgment has no one to blame but himself. In bringing suit against two parties on a joint contract, it was his duty to have directed process to be issued against both, and if he failed to do so, and subsequently took a judgment against one of the defendants who never had been summoned, he has no right to complain, because the law will not enforce the payment of such a judgment”: *Hanley v. Donoghue*, 59 Md. 239, 43 Am. Rep. 554. It would appear from the above quotation that the court was guided more by precedent in reaching its conclusion than by sound reasoning, and that it was not entirely satisfied with its own decision.

The courts of Mississippi also seem to be committed to the doctrine that a judgment against joint defendants is an entirety, and if void as to one, is void to all, whether such invalidity arises from the fact of the death of such defendant, or because he was not served with process, or from any other cause: *Martin v. Williams*, 42 Miss. 210, 97 Am. Dec. 456; *Weis v. Aaron*, 75 Miss. 138, 65 Am. St. Rep. 594, 21 South. 763.

In New York the question has been decided both ways. Thus, in *Holbrook v. Murray*, 5 Wend. 161, it was said that “the fact stated in this plea being admitted by the demurrer, the defense of a want of jurisdiction as to the person of this defendant is established. As to him the judgment is not conclusive; it is not even evidence of a demand; it is a nullity. What effect has this on the other defendants whose plea does not afford any defense? The judgment is entire, and if void as to one defendant, where there are several, it is void as to all. This precise point was decided in *Hall v. Williams*, 6 Pick. 232-247, 17 Am. Dec. 356, and in *Richards v. Walton*, 12 Johns. 434.” This case is, necessarily, in conflict with the decision in *St. John v. Holmes*, 20 Wend. 609, 32 Am. Dec. 603, that judgment against a firm will not be vacated because it was unauthorized by one of the firm, unless the motion to vacate was made by the member against whom the judgment was entered without his authority. The judgment is good against the partner who assented to it, though it may be inoperative against his copartner.

The inferior courts of Illinois have gone to the extent of holding that a judgment against joint defendants is a unit, and if erroneous or void as to one of them, is void as to all: *Grace v. Casey etc. Marble Co.*, 62 Ill. App. 149; *Larsen v. Larsen*, 90 Ill. App. 384. These decisions purport to be based on those of the supreme court of that state, but the latter do not support the proposition as thus stated, and only hold what may be conceded as undeniably true, that a judgment against two joint defendants, if one is not served and does not appear, is erroneous, and, on appeal therefrom, the judgment should be reversed as to all of the defendants and remanded gener-

ally, and the appellate court has no power to direct the trial court to enter a several judgment against the defendant served: *Brockman v. McDonald*, 16 Ill. 112; *Williams v. Chalfant*, 82 Ill. 218; *Clafin v. Dnnne*, 129 Ill. 241, 16 Am. St. Rep. 263, 21 N. E. 834; *Supreme Lodge Knights of Honor v. Goldberger*, 175 Ill. 19, 51 N. E. 647. Of course, the question discussed in the latter cases involves an entirely different question—namely, the disposition to be made on appeal of a voidable judgment, and not of a judgment absolutely void, simply because of its entirety. And the same may be said of the decisions in Missouri, as in the *City of St. Louis v. Gleason*, 15 Mo. App. 25, wherein it was held that a decree which is void for want of jurisdiction as to one of several defendants is void as to all, while the furthest that the decisions of the supreme court of that state have gone is to affirm that if there is a defective service of process upon one of several defendants, the one not properly served is entitled to have the judgment rendered against him jointly with the others set aside and that being an entire thing, he must have it set aside as to all of the defendants, as it cannot be split up and affirmed as to some, and reversed as to others against whom it has been rendered: *Randalls v. Wilson*, 24 Mo. 76; *Smith v. Rollins*, 25 Mo. 408; *Dickerson v. Chrisman*, 28 Mo. 134. This, we apprehend, is a very different proposition from affirming that such judgment unappealed from, is absolutely void as to all of the defendants, because of its entirety.

In Texas, a final judgment is indivisible. Hence, a judgment against joint defendants, when only part of them have been served with process, is void as to all: *Hulme v. Janes*, 6 Tex. 242, 55 Am. Dec. 774; *Long v. Garnett*, 45 Tex. 400.

The rule that a judgment against joint defendants is an entirety, and if void as to one of them is void as to all, is sustained by *Donnelly v. Graham*, 77 Pa. St. 274; *Stenhouse v. Bonum*, 12 Rich. 620; *Roberts v. Pawley*, 50 S. C. 491, 27 S. E. 913; *Jackson v. Heultz*, 6 Mackey, 518. If this rule is to prevail, then, when such judgment is made the basis of an action, whether in a domestic tribunal or not, against the defendant who has been properly summoned, he has a right to show the irregularity in respect to his codefendant, or that the court never obtained jurisdiction of the latter, and then he is entitled to defeat a recovery against himself, and, although such a result seems scarcely in keeping with sound reason and equal justice, some of the cases considering the judgment as an entirety have been forced to maintain this position: *Hanley v. Donaghue*, 59 Md. 239, 43 Am. Rep. 554; *Holbrook v. Murray*, 5 Wend. 161. It is conceded that the doctrine that a judgment void as to one defendant is void as to all applies only to judgments at law and not to decrees in equity: *Dickerson v. Chrisman*, 28 Mo. 134; *Voorhis v. Gamble*, 6 Mo. App. 1.

III. Jurisdictions Where Held Valid as to Defendant Served.

We now come to the consideration of those cases which support what may be termed the majority rule, and which repudiate the doctrine that a judgment against joint defendants, if void as to one, is necessarily void as to all. It is now firmly established in many states as a sound proposition of law that where, in an action upon a joint or joint and several obligation, all parties liable thereon are made defendants, the fact that the judgment therein rendered is void as to one of such defendants, because he was not summoned, or because his voluntary appearance was unauthorized, or if, from such or any other cause, the court failed to acquire jurisdiction over him, this does not render the judgment void as to all of the defendants. This, of course, is the doctrine adopted in the principal case, and certainly seems to us to be by far the more logical and better considered rule, and the one which must in the end prevail everywhere, except perhaps in those jurisdictions where the court feels itself too firmly bound by its former precedents to depart from the old and contrary rule. In Nebraska it is well settled that the fact that a joint judgment, either domestic or of a sister state, is invalid and void as to one of the defendants, because jurisdiction over him was never acquired in the action is not invalid as to his codefendants, nor ground for their avoidance of such judgment: *Mercer v. James*, 6 Neb. 406; *Council Bluffs Sav. Bank v. Griswold*, 50 Neb. 754, 70 N. W. 376. In Ohio, the same doctrine prevails, and the cases maintaining the opposite rule are expressly repudiated: *Douglass v. Massie*, 16 Ohio, 271, 47 Am. Dec. 375; *Ash v. McCabe*, 21 Ohio St. 181; *Newburg v. Munshower*, 29 Ohio St. 617, 23 Am. Rep. 769. It is there held that if judgment is taken against several defendants jointly, only part of whom have appeared in the action or been served with process, the defendants properly summoned cannot reverse the judgment for such error or irregularity: *Ash v. McCabe*, 21 Ohio St. 181. Such a judgment is not void, and if land is sold under an execution issued thereon, title to part thereof at least will pass to the purchaser at sheriff's sale: *Douglass v. Massie*, 16 Ohio, 271, 47 Am. Dec. 375. In New York, although, as we have already shown, there is a conflict in the authorities, the majority of them maintain the rule that if judgment is rendered against joint defendants, and it is irregular as to one of them because he was not properly before the court, it certainly is not void as to both, and that if execution is issued thereon against both, the court will not set it aside on the application of the defendant properly before the court, nor even as against his codefendant, but as to the latter it will be ordered that no execution shall go against his person or goods: *Green v. Beals*, 2 Caines, 254; *Brittin v. Wilder*, 6 Hill, 242; *Crane v. French*, 1 Wend. 311; *St. John v. Holmes*, 20 Wend. 609, 32 Am. Dec. 603, and note, p. 604, containing

a vigorous attack upon the doctrine of *Hall v. Williams*, 6 Pick. 232, 17 Am. Dec. 356, and giving the reasons for the maintenance of the rule under consideration, since adopted by courts and law-writers alike.

That a judgment void as to one or more defendants is not necessarily void as to all is the rule in Arkansas, as shown by *Cheek v. Pugh*, 19 Ark. 574, where it was decided that a judgment against a principal in an attachment bond and also against his sureties who were not made parties to the suit is not void as to such principal, though a mere nullity as to such sureties.

In Georgia it is also maintained that a judgment against two defendants on a joint and several contract, where one of them has never been served with summons, is void only as to the one not served, and the other can take no advantage of the error: *Kitchens v. Hutchins*, 44 Ga. 620. In Illinois, although, as before said, the inferior courts hold that a judgment against joint defendants is necessarily a unit, and if void as to one must be void as to all (*Larsen v. Larsen*, 90 Ill. App. 384), this is not the proposition announced by the supreme court of that state. In *Murphy v. Orr*, 32 Ill. 489, it was announced that if the court has jurisdiction of the subject matter of the suit and of the person of one of the defendants, a judgment against him until reversed or set aside is binding on him, although it may be inoperative as to his codefendants therein by reason of their not having been properly brought into court. And to the same effect are the cases of *Williams v. Chalfant*, 82 Ill. 218, and *Supreme Lodge Knights of Honor v. Goldberger*, 175 Ill. 19, 51 N. E. 647, which simply hold that such a judgment is erroneous, and may, upon appeal, be reversed as to all of the defendants. In Iowa a confession of judgment by one partner in the name of the firm, without the consent of his copartners is valid against the partner making the confession: *North v. Mudge*, 13 Iowa, 496, 81 Am. Dec. 441. In Missouri, also, the prevailing rule is that when a joint judgment is rendered against several defendants, and one of them is not summoned and does not appear, the judgment is not void as to the defendant or defendants served, and though the judgment may be considered as an entirety for the purposes of review on appeal or writ of error, and would be reversed as to all of the defendants if thus directly attacked, it cannot be collaterally assailed in another proceeding: *Lenox v. Clarke*, 52 Mo. 115; *Bailey v. McGinness*, 57 Mo. 362; *Holton v. Towner*, 81 Mo. 360; *Williams v. Hudson*, 93 Mo. 524, 6 S. W. 261; *Boyd v. Ellis*, 107 Mo. 394, 18 S. W. 29. In Pennsylvania, if a judgment is rendered generally against several defendants, one of whom is not served, the judgment, though void as to the latter, is valid as to the others: *Jamieson v. Pomeroy*, 9 Pa. St. 230; *Shallcross v. Smith*, 81 Pa. St. 132. Or if a judgment is confessed by one partner in the name of

the firm without the authority of the copartner, although it is void as to the latter, is valid as to the former, both as evidence of the amount of his indebtedness and as a lien upon his land: *York Bank's Appeal*, 36 Pa. St. 458.

If judgment is entered against all of the defendants where some are not served with process and do not appear, the judgment is not void as to those served, but only erroneous or voidable, and may be reversed on writ of error. Such is the rule in Tennessee: *Winchester v. Beardin*, 10 Humph. 247, 51 Am. Dec. 702; *Crank v. Flowers*, 4 Heisk. 629; *Collins v. Knight*, 3 Tenn. Ch. 183.

The same doctrine prevails in Virginia: *Gray v. Stuart*, 33 Gratt. 351, where it is said in this connection that "there is a manifest distinction between an erroneous judgment and a void judgment. The first is a valid judgment, though erroneous, until reversed, provided it is the judgment of a court of competent jurisdiction. The latter is no judgment at all; it is a mere nullity. The first cannot be assailed in any other court but an appellate court; the latter may be assailed in any court, anywhere, whenever any claim is made or right asserted under it": *Gray v. Stuart*, 33 Gratt. 351. In a late case in Wisconsin it has been decided that the fact that a joint judgment is invalid as to one of the defendants because jurisdiction was never acquired over him does not avoid the judgment as to his codefendant who was properly served: *Keith v. Stiles*, 92 Wis. 15, 64 N. W. 860, 65 N. W. 860.

IV. Disposition upon Appeal.

When consideration is had of the question as to the proper disposition to be made of a joint judgment against several defendants which is irregular or voidable as to one of them, when it is brought before an appellate court or court of review by writ of error or appeal, the authorities are found to be very nearly harmonious, and, in general, they agree that it cannot be affirmed as to one defendant and reversed as to another, but must be reversed as to them all as an entirety, upon the application of one of them: *Ellison v. State*, 8 Ala. 273; *Gargan v. School Dist.*, 4 Colo. 53; *Streeter v. Marshall Silver Min. Co.*, 4 Colo. 535; *Tedlie v. Dill*, 3 Ga. 104; *Kimball v. Tanner*, 63 Ill. 519; *Williams v. Chalfant*, 82 Ill. 218; *Claffin v. Dunne*, 129 Ill. 241, 16 Am. St. Rep. 263, 21 N. E. 834; *Supreme Lodge Knights of Honor v. Goldberger*, 175 Ill. 19, 51 N. E. 647; *Cavender v. Smith*, 5 Iowa, 157; *Joyes v. Hamilton*, 10 Bush, 544; *Murphy v. O'Reiley*, 78 Ky. 263; *Winslow v. Lambard*, 57 Me. 356; *Covenant etc. Ins. Co. v. Clover*, 36 Mo. 392; *Holton v. Townner*, 31 Mo. 360; *Sargeant v. French*, 10 N. H. 444; *Burt v. Stevens*, 22 N. H. 229; *Frazier v. Williams*, 24 Ohio St. 625; *Newburg v. Munshower*, 29 Ohio St. 617, 23 Am. Rep. 769; *Donnelly v. Graham*, 77 Pa. St. 274; *Roberts v. Pawley*, 50 S. C. 491, 27 S. E. 913; *Draper v. State*, 1 Head, 262; *Wood v. Smith*, 11 Tex. 367; *Dickson v.*

Burke, 28 Tex. 117. An entire judgment against several defendants, whether rendered in an action for a tort or upon a contract, cannot be reversed as to one defendant and affirmed as to the others: Powers v. Irish, 23 Mich. 429; Sheldon v. Quinlen, 5 Hill, 441. If a judgment is rendered against defendants on a joint contract, granting a new trial on the application of one for an irregularity as to him vacates the judgment as to both defendants: Hughes v. Lindsey, 10 Ark. 555; Wootters v. Kauffman, 67 Tex. 488, 3 S. W. 465. It has also been held that if the judgment is void as to some of the defendants, it may be vacated on motion, though made by a defendant over whom the court had jurisdiction: Pomeroy v. Betts, 31 Mo. 419. If the judgment is several as to the parties, it may be good as to one while invalid as to another, and in such case the appellate court may reverse it in part and affirm it in part, but this is not so where it is joint and an entirety against several defendants: Cavender v. Smith, 5 Iowa, 157; Powers v. Irish, 23 Mich. 429; Shallcross v. Smith, 81 Pa. St. 132. The rule that a joint judgment, if invalid as to one of the defendants, must be reversed as to all and in toto, does not apply in Nevada. In this state it may be affirmed against the defendant as to whom it is valid, and reversed as to the defendants against whom it is irregular and invalid; Wood v. Olney, 7 Nev. 109. The rule in California seems to be that if only one of several defendants against whom judgment has been rendered appeals, the appellate court, if it reverses the judgment, may reverse or modify as to all or any of the parties defendant. If in such case the error assigned affects only the party appealing, error is not presumed as to the parties not appealing, and the judgment will not be reversed as to them, though reversed as to the defendant appealing: Ricketson v. Richardson, 26 Cal. 149. In Texas it has been held that if there are several defendants, one of whom is not served, and judgment by default is rendered against all of them, and all appeal, the judgment may be reformed in the appellate court by dismissing the action as to the one not served, and affirming the judgment as to the others: Saffold v. Navano, 15 Tex. 76. The practise in this respect certainly may be, and we apprehend is, regulated by statute in many of the states.

V. Conclusion.

In conclusion, it may be said that on one side we have a line of authority maintaining that "the judgment is entire, and, if void as to one defendant, where there are several, it is void as to all," and that being absolutely void it cannot be enforced against any of the defendants, whether appealed from or not. Under this rule such judgment is a mere nullity, binding no one, and under which no one can acquire any rights, while the debtor defendant regularly served and against whom no irregularity exists, may impeach the judgment in either a direct or a collateral proceeding, although he

has been deprived of no rights nor injured by the irregular or erroneous service of process on his codefendant. This rule does not seem to us to teem with sound legal reason or justice.

The other line of authority, which is vastly in the majority, establishes what seems to us the much more reasonable rule—namely, that although a joint judgment against several defendants may be erroneous, and hence invalid as to one of the defendants for want of service on him and jurisdiction over him, still it is not an absolute entirety, but is divisible, and is valid and binding upon the others, who are regularly served, or, at most, voidable as to them and not void in toto. If this view is adopted, it is evident that the judgment will be attended with the usual incidents of a valid judgment as against any defendant over whom jurisdiction has attached, until it is regularly reversed or vacated, and that until such action is successfully taken, suit will lie on the judgment against him, and he will not be permitted to attack the judgment collaterally, or take advantage of its irregularity as to his codefendant for his own benefit. This is, undoubtedly, the true and correct reasoning on a much vexed legal proposition, over the determination of which the courts of the several states have, unfortunately, fallen into irreconcilable conflict.

MAGOUN v. FIREMAN'S FUND INSURANCE CO.

[86 Minn. 486, 91 N. W. 5.]

INSURANCE—Estate of Deceased.—A policy insuring the "estate" of a deceased person against loss by fire is valid and enforceable. (p. 372.)

INSURANCE—Mortgage Clause.—A policy of insurance providing that if it shall be made payable to a mortgagee of the insured property, no act or default of any person except such mortgagee, his agents, or those claiming under him, shall affect the right of the mortgagee to recover in case of loss, which shall be payable to a certain named person, mortgagee, as his interest may appear, gives to such mortgagee independent insurance, which cannot be destroyed by any act or default of the mortgagor, or of any person except the mortgagee, his agent, or privies. (p. 374.)

INSURANCE—Failure of Agent to Disclose Facts—Excessive Insurance.—If an insurance agent is part owner of the insured property as heir to one deceased subsequently to the execution of a mortgage on the property, and also one of the makers of the mortgage note, his failure when issuing the policy to notify his company of these facts, or that there was a prior policy upon the property issued to such mortgagee, does not void the policy last issued, although the amount of insurance is in excess of the amount permitted as concurrent insurance. (p. 375.)

INSURANCE—Change in Title.—If an agreement under which a mortgagee is to receive a conveyance of insured premises in satisfaction of the mortgage debt is not fully consummated prior to loss under the policy, there is no change in the legal title to the property, so as to constitute that a ground for the avoidance of the policy. (p. 375.)

TRIAL—Question for Jury.—A pure issue of fact must be submitted to the jury, and it is reversible error for the court to take the question thus involved away from and direct the verdict. (p. 376.)

Brown & Kerr and V. Stearns, for the appellant.

McGiffert & Hunter and Baldwin & Baldwin, for the respondent.

⁴⁸⁷ COLLINS, J. This action was brought by the plaintiff, as mortgagee, to recover upon a Minnesota standard fire insurance policy insuring a dwelling-house, issued by the defendant company, payable to the "estate of Elizabeth L. Hazen and legal representatives," with loss, if any, payable to the plaintiff, as mortgagee, as her interest might appear. It contained this provision: "If this policy shall be made payable to a mortgagee of the insured real estate, no act or default of any person other than such mortgagee or his agents or those claiming under him shall affect such mortgagee's right to recover in case of loss on such real estate."

The mortgage held by plaintiff was given to secure an indebtedness of eighteen hundred dollars, evidenced, according to the mortgage, by the note ⁴⁸⁸ of Elizabeth L. Hazen, then owner of the property, but who had deceased prior to the issuance of the policy. Her son, Edward Hazen, was also one of the makers of the note. He was also a member of the firm of Hazen & Getchell, agents for the defendant company at Duluth. His brother, C. S. Hazen, and himself were sole heirs at law of the deceased, Elizabeth, their mother, and the owners of the insured property, subject to the mortgage and a settlement of the estate in the probate court. The insurable value of the dwelling-house was two thousand four hundred dollars. After the decease of Elizabeth an agent of the plaintiff mortgagee requested Edward Hazen to insure the property, and, it is claimed, then and there informed him that plaintiff had previously procured a policy insuring her interest, as mortgagee, to the amount of eighteen hundred dollars, which, it is to be observed, was the full amount of her claim. The loss was total. At the conclusion of the evidence defendant's counsel moved for a directed verdict in favor of their client, which was de-

nied. The plaintiff's counsel then moved the court to direct a verdict in favor of the plaintiff for the full amount claimed in the complaint, which motion was granted, and such verdict returned. Later, upon a settled case, an alternative motion (Laws 1895, c. 320) was made by defendant's counsel, and was denied. This appeal is from the order denying the alternative motion.

A large number of assignments of error are presented, many of which need no consideration. It is claimed by defendant's counsel: 1. That the policy was void upon its face, because made payable to the "estate of Elizabeth L. Hazen and legal representatives"; 2. That it was void because it was issued by an agent of defendant company, who was in fact part owner of the property insured, and was also one of the makers of the note secured by the mortgage—the position assumed being that he was thereby incapacitated from acting as defendant's agent in the issuance of a policy—these facts being known to plaintiff's agent to whom the policy was delivered; 3. That it was void because plaintiff had other insurance, which, with that now involved, was in excess of the insurable value; and 4. That the policy was avoided because plaintiff had actually purchased the property from the heirs at law in full satisfaction of the note, and thereby had ^{also} destroyed the right of subrogation as against Edward Hazen, to which defendant would have been entitled, by the terms of the policy, upon payment of the loss. We take these contentions in their order.

1. It is beyond question that a policy insuring the estate of a deceased person against loss by fire is valid and enforceable. This statement is supported by all of the text-books upon the subject of fire insurance, and is based upon the self-evident proposition that an insurance company should not be permitted to issue a policy, so worded by its own agent, take the premium for, and pretend to insure and protect from loss, and then, when the loss occurs, insist that it is not liable, because, instead of having named the heirs, executors, or administrators of the deceased person as the insured, it simply specified the estate of such person as the insured—an error, if such it is, which can be easily corrected by a reformation of the contract: *Clinton v. Hope Ins. Co.*, 51 Barb. 647, affirmed in the court of appeals, 45 N. Y. 454; *Herkimer v. Rice*, 27 N. Y. 163; *Weed v. Hamburg-Bremen Ins. Co.*, 133 N. Y. 394, 31 N. E. 231. To the same effect in fact is *Holbrook v. St. Paul etc. Ins. Co.*, 25 Minn. 229. The case cited in opposition—*Kenaston v.*

Lorig, 81 Minn. 454, 84 N. E. 323—is not in point at all, for there the question was as to the passage of the legal title to real estate by a sheriff's certificate of foreclosure, in which the grantee was the "estate of A B, deceased." In disposing of this point it is not necessary to consider the fact that the policy was also made payable to the "legal representatives" of the Hazen estate.

2. As before stated, Hazen was one of the firm representing defendant company at Duluth, was one of the heirs at law of the deceased owner, and also one of the makers of the secured note. We are not now prepared to assent to the contention of defendant's counsel that his interest in the insured premises was such that he could not bind defendant company by the issuance of its policy, because there would be such a conflict of duty on his part as would require the courts to hold that such a contract is void as against public policy. If this be the law, insurance agents, who habitually insure their own property, and agents who make a practise of insuring property confided to their care in companies ⁴⁰⁰ represented by them, have for years been taking great risks themselves, and have also been jeopardizing the interests of others; for it is well known that insurance agents are frequently selected because of desirable risks owned or controlled by them which can be carried by the companies they represent. But we are not compelled to decide the question at this time, for the efficiency of the insurance contract with this plaintiff was not dependent upon the validity of a contract between defendant company and the estate of the deceased or her legal representatives, nor upon the act of defendant's agents.

The plaintiff was not, under the terms of the policy, simply a conditional appointee to receive what, if anything, might become due to the estate, as she would have been had she been wholly dependent upon the "open mortgage clause," ⁴⁰¹ so called, formulated in the words, "Loss, if any, . . . payable to Mary Y. Magoun . . . as her interest may appear." Her status was of a more certain and definite nature, because the policy contained, in substance, what is known as the "union mortgage clause" as distinguished from the "open mortgage clause." It has by statute been made a part of the standard policy, inoperative when standing alone, but made valid and enforceable when the clause making the loss, if any, payable to the mortgagee, is attached. It is an independent contract of insurance covering the mortgagee's interest, and giving him the same protection as

if he had taken out a separate policy. By it he is freed from conditions imposed upon the owner. It is well settled that a clause of this kind applies exactly in the manner expressed therein. The conditions of insurance relating to such interests are governed and controlled in the manner written upon, attached, or appended to the policy, and not otherwise. A provision of this sort is an independent contract between the defendant company and the mortgagee, and where it is found in the policy the mortgagee's right to recover is not affected or invalidated by the act, neglect or omission or default of the mortgagor or "of any person other than such mortgagee or his agents." His insurance cannot be destroyed by the acts or default of the mortgagor or others. Its clear purpose is to secure and make certain the interests of the mortgagee, and it is to be construed ⁴⁹¹ in this light: 13 Am. & Eng. Ency. of Law, 2d ed., 205, 206; Elliott on Insurance, sec. 341.

A comparison of the union clause as it appears in policies issued in different states with that now before us will show that there is no substantial difference in them, and the authorities are uniform in their construction of such a clause. It must follow that the mortgagee was not responsible for the failure of Hazen to advise the defendant company that he was part owner of the property insured, and was also one of the makers of the note secured by the mortgage. Under this clause his act or default in this respect is not attributable to her. Nor was she liable for his failure to inform the company of the additional insurance, for the delivery of the policy to the mortgagee with notice of this outstanding insurance constitutes consent upon the part of the insurer to the additional insurance. This is a general rule, and is not affected by the fact that Hazen was part owner of the premises, and was also one of the makers of the note, because of the independent contract provided for in the union mortgage clause.

3. It is further claimed that the policy was invalidated before the fire, because there was a conveyance of the insured property to the mortgagee in satisfaction of the mortgage note. It is true that a written agreement was made between the plaintiff's agent and Edward Hazen, which, if executed, would have placed the legal title of the property in the mortgagee; but this agreement was not complied with. By its terms Hazen was to provide for the expense of publishing a notice of foreclosure, was to execute and deliver a quitclaim deed conveying the premises, presumably to the mortgagee, and also his promissory note for

one hundred dollars. Plaintiff was to bid in the premises at a foreclosure sale for the full amount due, and thus release Hazen from further liability. The latter never made or attempted to provide for the expense of publication, and did nothing about it. Fairly construed, this agreement meant that Hazen was to pay, or secure payment of, the cost and expense of the publication. He simply caused to be executed and delivered to plaintiff's agent a quitclaim deed of the premises. This was never accepted by the agent as a fulfillment or performance of the contract. It conclusively appears that none of the parties considered ¹⁹² that the agreement had been complied with, or that the title had passed. The claim, therefore, that by these acts plaintiff released Edward Hazen from the note, of which he was a signer, and therefore deprived the defendant company of its right to subrogation, is without foundation.

4. As above stated, it was claimed by the plaintiff's agent, and he so testified upon the trial, that when requesting further insurance from Hazen he advised him of the existence of another policy in which the plaintiff's interest was secured to the extent of eighteen hundred dollars. Hazen upon the witness-stand denied this, and claimed that he had no notice of existing additional insurance until after the loss occurred. Here was an issue of fact between these parties which should have been submitted to the jury. If a jury should find that Hazen was informed of this additional insurance at the time of the request that another policy issue, or at any time before it was delivered, this amounted to notice to the defendant company, and it would be bound by it; but if, upon the other hand, Hazen had no notice of this additional insurance, which violated a policy provision, until after the fire, the defendant company would not be liable. It was error for the court to take this question from the jury, and for that reason a new trial must be granted.

5. Counsel for plaintiff insist that, in any event, the unauthorized acts of defendant's agents were subsequently ratified by the company with full knowledge of the facts. We find some testimony strongly tending to show a ratification, but it consists in part of answering letters written to Mr. Hazen by defendant's general agent, after the fire, and after the latter had been informed of the additional insurance, and also that Hazen was part owner of the property. The letters from Mr. Hazen to the agent, which induced these answers, are not in evidence, and we are unable to say from the testimony produced that, as

a matter of law, the defendant company ratified the acts of its agents.

6. In conclusion, we wish it understood that we are not now deciding that plaintiff has the absolute right to recover upon the policy. The contract was that she should recover "as her interest may appear." What her interest actually was might be affected by ⁴⁹³ full or part payment of concurrent insurance through the other policy.

Order reversed, and a new trial granted.

If a Policy of Fire Insurance makes the loss payable to the mortgagee, and also provides that no violation of its conditions by the mortgagor shall affect the mortgagee, the latter may recover to the extent of his interest, notwithstanding such violation: See the monographic note to Oakland Home Ins. Co. v. Bank of Commerce, 58 Am. St. Rep. 672; Lancashire Ins. Co. v. Boardman, 58 Kan. 339, 62 Am. St. Rep. 621, 49 Pac. 92. The assignment by one of the mortgagors of his interest in insured property does not avoid the right of the mortgagee to recover on a policy payable to him, and providing that the act of no one other than himself or those claiming under him shall affect his right to recover in case of loss: Whitling v. Burkhardt, 178 Mass. 535, 86 Am. St. Rep. 503, 61 N. E. 1.

GILMORE v. LAMPMAN.

[86 Minn. 493, 90 N. W. 1113.]

JURISDICTION.—Constructive Service of Process is purely a statutory creation, in derogation of the common law, and the requirements of the statute must be strictly observed or the attempted service will be fatally defective. (p. 378.)

JURISDICTION.—Constructive Service of Process.—The affidavit for publication of summons is of itself the prerequisite upon which jurisdiction is based, and it must contain and state positively all the facts required by the statute, otherwise it is fatally defective. (p. 379.)

JURISDICTION.—Affidavit for Publication of Summons which fails to state that the defendant has property within the state, or that the subject matter of the action is within the state, is fatally defective, and does not confer jurisdiction. (p. 379.)

JURISDICTION.—Affidavit for Publication of Summons, if defective, cannot be aided by reference to the other papers of record in the case for the purpose of conferring jurisdiction. (p. 379.)

A. G. Morey, for the appellant.

Wilson & Van Derlip, for the respondent.

⁴⁹³ LEWIS, J. In an action to foreclose a mechanic's lien, service by publication was attempted to be made as to the re-

spondent, Adelaide B. Lampman, and the following affidavit was executed on June 27th, and filed on July 18, 1901:

494 "State of Minnesota, }
County of Hennepin. } ss.

"A. G. Morey, being first duly sworn, deposes and says: That he is the attorney for the plaintiffs in the above-entitled action; that the above action was brought for the purpose of foreclosing a mechanic's lien, and that Adelaide B. Lampman, one of the defendants, has property in this city, and is the owner of property described in the complaint; that he believes that the said defendant Adelaide B. Lampman is not a resident of the state of Minnesota, but that she is a resident of Newark, Essex county, New Jersey. Affiant further says that this affidavit is made for the purpose of obtaining an order of this court that the service of the summons in this action may be made upon Adelaide B. Lampman, one of the said defendants, by publication.

ARTHUR G. MOREY.

"Subscribed and sworn to before me this 27th day of June, 1901.

"[Notarial Seal]

R. C. WYVELL,

"Notary Public, Hennepin County, Minn."

Subsequently, on July 19th, another affidavit was filed, stating that on that day a true copy of the summons in the action was deposited in the postoffice at Minneapolis, Minnesota, inclosed in an envelope duly stamped and addressed to Adelaide B. Lampman at Newark, Essex county, New Jersey. The first publication of the summons was on Saturday, July 20th. The complaint was verified on July 9th and filed on July 18, 1901, and stated that the respondent was the owner of real estate (describing it) in the city of Minneapolis, Hennepin county, Minnesota. On February 11, 1902, respondent appeared specially by counsel, and moved the court for an order to set aside the service of the summons on the ground that the same was void. The motion was granted, and plaintiffs appealed.

The only question before the court is the sufficiency of the affidavits for publication. Appellants complied with the provision of the General Statutes of 1894, section 5204, unless, in the first affidavit referred to, there was a failure to state that respondent had property in the state of Minnesota, and that the court had jurisdiction of the subject of the action, or that the subject of the action was real property within the state. It

will be conceded that the second affidavit ⁴⁹⁵ was sufficient to cover the omission in the first as to the posting of the summons. Appellant contend for the sufficiency of the affidavit upon the ground that in respect to the description of the property owned by respondent in the state of Minnesota, reference might be had to the complaint on file, and that, if the affidavits were insufficient under the third subdivision of section 5204, then they were sufficient under the fifth subdivision.

The nature of constructive service by publication has been expressed in the following language: "Constructive service of process is purely a statutory creation, and in derogation of the common law, for which reason the requirements of the statute must be strictly observed, . . . and a failure to follow the statute will render the attempted service fatally defective." Or, as stated in the case of *Barber v. Morris*, 37 Minn. 194, 5 Am. St. Rep. 836, 33 N. W. 559: "The statute prescribes the means, through a constructive service of the summons, by which a court may acquire jurisdiction to render judgment affecting property within the state. This mode of conferring jurisdiction is effectual only as the statute makes it so, and whatever the statute prescribes as a prerequisite condition cannot be dispensed with." In that case, the affidavit for publication was not filed until the entry of judgment.

In the case of *Feikert v. Wilson*, 38 Minn. 341, 37 N. W. 585, the affidavit stated, upon information and belief, that the defendant had property within the state, instead of stating the fact in a direct and positive manner, and the court held that the statute required a strict compliance with its terms. The rule laid down in *Barber v. Morris*, 37 Minn. 194, 5 Am. St. Rep. 836, 33 N. W. 559, is also applied and approved in *Brown v. Northern Pac. Ry. Co.*, 38 Minn. 506, 38 N. W. 698. In the case of *Easton v. Childs*, 67 Minn. 242, 69 N. W. 903, it is held that under section 5204 the filing of the sheriff's return is not a jurisdictional prerequisite to the publication of the summons, overruling *Corson v. Shoemaker*, 55 Minn. 386, 57 N. W. 134. This decision supports the theory that such statutes should be strictly construed, but requires no more to be done than is expressly stated. The statute does not require the filing of the sheriff's return before commencement of the publication, and it was therefore properly held that ⁴⁹⁶ the filing was not a prerequisite to the publication, but was *prima facie* evidence in its support.

In this case the affidavits themselves were wholly deficient

because they did not state that respondent had property in the state of Minnesota. The affidavit itself is the prerequisite upon which jurisdiction is based, and it must contain and state positively all of the facts required by the statute. When a proceeding is commenced to obtain service by publication, the defendant has the right to examine the affidavit on file, and to govern his conduct accordingly. It is immaterial that the complaint contains the information wanting in the affidavit, for the interested party is not required to examine the complaint to ascertain the facts. Whatever may have been the holdings in some jurisdictions, we know of no case where, under a similar statute, it has been held that the affidavit may be aided by reference to other papers of record. It has become the well-recognized and settled rule in this state that the affidavit must be complete in itself as to all material matters, and we hold that the affidavits in question are insufficient, and did not confer jurisdiction.

Order affirmed.

When Service of Process is Constructive, rather than actual or personal, greater strictness of proceeding is exacted than when the mode of acquiring jurisdiction is more clearly according to the course of the common law: See the monographic note to Sanford v. Edwards, 61 Am. St. Rep. 494, 495. The sole purpose of an affidavit for the publication of summons is to enable the court to determine whether the action is one in which jurisdiction may be obtained by service by publication. And it is sufficient if it advises the court of the nature of the action, and that the action is of such a character that the court can acquire jurisdiction by such service: Leigh v. Green, 62 Neb. 344, 89 Am. St. Rep. 751, 86 N. W. 1093. An order for the publication must be based upon an affidavit showing a cause of action, and that the defendant is a nonresident: Anderson v. Goff, 72 Cal. 65, 1 Am. St. Rep. 34, 13 Pac. 73. See, also, Beckett v. Cuenin, 15 Colo. 281, 22 Am. St. Rep. 399, 25 Pac. 167; Hartzell v. Vigen, 6 N. Dak. 117, 66 Am. St. Rep. 589, 60 N. W. 203; Woodward v. Brown, 119 Cal. 283, 63 Am. St. Rep. 108, 51 Pac. 2, 542.

deposited with each proposal." For the purposes of the proceeding we assume, but do not decide, that these questions and all others not specially discussed should be solved in plaintiff's favor. So viewing the case, we deem it necessary or advisable to consider but four questions.

1. The defendants Donovan and Hays attack the petition and alternative writ of mandate upon the ground that the proceeding is, in effect, an action against the state, and say that a state of the Union is not without its express consent subject to suit in its own courts or in those of another state. They say that the doctrine is absolute, and cannot be overthrown indirectly by the institution of actions against state officers when in effect they are actions against the state. With this we agree: *Langford v. King*, 1 Mont. 33; *Fisk v. Cuthbert*, 2 Mont. 593; *State v. Kenney*, 9 Mont. 389, 24 Pac. 96; 23 Am. & Eng. Ency. of Law, 1st ed., 83. But the present proceeding is not, in effect, an action or proceeding against the state. If the allegations of the petition are true, the proposal of the plaintiff was regularly accepted and the contract let to it as the lowest responsible bidder after a compliance with all the statutory requirements. The state, by its authorized agent, ²⁸ awarded a contract, and the object of the present proceeding is to compel the defendants, as public officers of the state, to sign the formal contract, and thereby perform what is alleged to be their ministerial duty. If the duty to be performed by a public officer of the state is purely ministerial, the writ of mandate may be issued, the case being otherwise a proper one for the employment of such writ: *State v. Smith*, 23 Mont. 44, 57 Pac. 449, and cases there cited; *Marbury v. Madison*, 1 Cranch, 137; *In re Ayers*, 123 U. S. 506, 8 Sup. Ct. Rep. 183. In the case last cited the court approved the following extract from the opinion in *Board of Liquidation v. McComb*, 92 U. S. 541: "A state, without its consent, cannot be sued by an individual; and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter. But it has been well settled that when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and, when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it"; and upon that principle

this court has often entertained proceedings against state officers, the latest being *State v. Barret*, 25 Mont. 112, 63 Pac. 1031. If the defendants owe to the plaintiff the performance of an act which the law specially enjoins as a duty resulting from an office—in other words, if the defendants, as members of the board, owe to the plaintiff a duty, and the performance of that duty is a ministerial act not involving the exercise of discretion or judgment—the writ of mandate will lie to compel such performance, and the state is not thereby subjected to an action or proceeding. The petition is not obnoxious to the objection urged.

2. Section 707 of the Political Code provides with reference ²⁹ to the state furnishing board: "The proposals received must be directed to the board, opened and compared by it at its office at 12 o'clock noon of the day specified in the advertisement, and the board must award the contract for furnishing such supplies, or any of them, to the lowest responsible bidder at such time." Section 709 provides, among other things, that any and all bids may be rejected and the board may advertise again. The board is a governmental agency, possessing such powers and jurisdiction, and such only, as the law confers upon it. In the examination, comparison, and consideration of the proposals and in awarding the contract the board exercises its discretion. The duty imposed is to award the contract to the lowest responsible bidder, unless the bids be rejected. This the statute commands it to do; and whenever, after a compliance with the statutory prerequisites essential to the valid acceptance of a bid, it has regularly awarded the contract, there spring into existence vested rights which the board cannot destroy or impair. It cannot insert into the formal written contract any condition not consonant with the contract already made by virtue of the acceptance of the bid: *American Lighting Co. v. McCuen*, 92 Md. 703, 48 Atl. 352. In the absence of fraud, accident and mistake, or other legal reason sufficient to render the acceptance void or voidable, the contract resulting therefrom cannot (unless by mutual consent) be changed or annulled, nor may its obligation be impaired, by any act of the board. True, such a contract is subject to the approval of the governor and state treasurer (Const., art. 5, sec. 30; Pol. Code, sec. 710; *State v. Hogan*, 22 Mont. 384, 56 Pac. 818; *State v. Smith*, 23 Mont. 44, 57 Pac. 449), but this is a matter which does not concern the members of the board nor give it the right to recall the acceptance and award.

When it has thus regularly discharged the duty imposed upon it by the law, its jurisdiction in respect of awarding the contract is exhausted; its discretion was exercised and the power further to exercise it is gone. We are ³⁰ aware that there is some conflict of opinion upon this subject, but we think that such must, in the nature of things, be the rule applicable to boards and officers clothed with specially delegated authority and intrusted with limited jurisdiction. Support for these general observations may be found in *People v. Board of Contract etc.*, 2 How. Pr., N. S. 423; *People v. Campbell*, 72 N. Y. 496; *State v. York County*, 13 Neb. 57, 12 N. W. 817; *Wren v. Fargo*, 2 Or. 20; *People v. Gleason*, 121 N. Y. 631, 25 N. E. 4; *Boren v. Darke Co. Commrs.*, 21 Ohio St. 311; *State v. Barbour*, 53 Conn. 76, 55 Am. Rep. 65, 22 Atl. 686.

The action of the board in attempting to cancel the contract was void, unless a cause existed which the law recognizes as sufficient to invalidate the contract. We proceed to ascertain whether such cause appears.

3. In behalf of the attorney general and the Secretary of State the argument is advanced that the reason stated in the resolution was sufficient to justify the board in reconsidering the motion by which the bid of the plaintiff was adopted and in canceling the contract thereby created. It is asserted and seriously argued that, conceding the regularity of all the proceedings precedent to the letting of the contract and the validity of the letting, the board possessed the right to cancel the contract upon the ground that the plaintiff "was denominated by the labor unions of the United States as hostile to labor organizations and was classed as a scab company." The advertisement was silent upon the subject of union labor and nonunion companies or persons; it did not pretend to limit the bidding to those who were friendly or indifferent to labor organizations,—if it had done so it would, as we shall see, have been invalid; on the contrary, the notice was addressed to all persons—the invitation to present proposals was general. The proposal of the plaintiff was filed; the board declared it to be the lowest responsible bidder and awarded the contract to it. The plaintiff ³¹ was not guilty of fraud or deceit; the board was not misled; it was not induced to let the contract by any misrepresentation whatever; the bid of the plaintiff was not accepted through any accident or mistake. By what sort of logic do the attorney general and Secretary of State attempt to defend their position? Let their answer speak upon this point. After reciting that the

plaintiff was hostile to labor organizations and was classed as a nonunion company, it avers that this "fact, in the judgment of defendants as said state furnishing board, rendered said company liable to be enjoined from carrying out said contract, and on the further grounds that said company was more liable to be unavoidably delayed by strikes and labor troubles than if said contract were let and awarded to a company or person not hostile to labor organizations; that, knowing the attitude of labor organizations toward the relator herein, it was probable and likely that the furnishing and delivery of the furniture and supplies under said contract by said relator would result in great damage and injury to the state, which could not be adequately provided against under the contract. The fact that said company was hostile to labor organizations, and having been so classed by them as a nonunion company, was a reason, in the judgment of the defendants as such state furnishing board, which would affect their responsibility as bidders, and render them less responsible and trustworthy than if they were not hostile to labor organizations or classed as a nonunion company. That said fact that said relator was hostile to labor organizations and classed as a nonunion company was not known to the defendants at the time they let and awarded said contract to the relator herein." Is it not wasting words to declare the evident and palpable fact that this is not a reason which the law recognizes as a sufficient cause for avoiding the contract? We are not to be understood as denying the legal right of the board in good faith, but erroneously to award a contract to one who is not in fact the lowest responsible bidder, for we apprehend the rule in this state to be that the action of the board will be controlled or interfered with only where it clearly appears ³² that the refusal to award the contract to the lowest responsible bidder was fraudulent or in bad faith, or was the result of an abuse of discretion (which is equivalent to a failure to exercise discretion); that the refusal was merely erroneous is not sufficient to justify the issuance of the writ of mandate. Such seems to be the principle underlying the decision in *State v. Richards*, 16 Mont. 145, 50 Am. St. Rep. 476, 40 Pac. 210. It may be that the refusal to award a contract to the lowest bidder who is in all respects responsible, for the sole reason that he is inimical to organized labor and is classed as a nonunion employer, would be arbitrary, oppressive and unjust conduct, indicating that the board failed to exercise discretion. But however this may be, the rule stated

is inapplicable to the case at bar. The action of the defendants must be tested by a more rigid rule, for the board did not refuse to let the contract; it awarded the contract to the plaintiff, and seventeen days thereafter ordered its cancellation for the alleged reason stated in the resolution of August 23d. If a contract was made by the acceptance of the bid, the board was powerless to rescind its action and thereby cancel the contract, except for a cause which, in the eye of the law, rendered it void or voidable. In this respect it was like a contract between individual persons, in which each enters into covenants with the other—it could not be annulled at the pleasure or caprice of one party alone. Can it be sanely suggested by even the most prejudiced man that a private person possesses the legal right to hold for naught a contract to which he is a party because the other party is a person who is inimical to organized labor and is classed as a nonunion employer, the contract being silent on that subject? Of course the law would not recognize such reason as cause for the annulment of the contract; and equally, as a matter of course, is the rule the same in the case of contracts between boards and the individual person or corporation. In so far as its legal value and force is concerned, the reason assigned might as well have been that the plaintiff employed members of labor unions, was therefore inimical to ~~as~~ nonunion workingmen, and was classed as a union company; or that the directors of the plaintiff believed in the dogma of the infallibility of the Pope, and were therefore unfriendly to Protestants, or in the doctrine of transubstantiation and in auricular confession, or were high churchmen, and therefore classed as ritualists; or that they were in sympathy with England's policy toward Ireland, and therefore distasteful to the Fenians; or were members of a law and order league, and hence inimical to anarchists and their sympathizers. In passing we observe, by way of illustration, that a contract between private persons may provide that it shall cease to be obligatory or be void if either party to it shall employ nonunion men, and the law will permit the provision to have its full force; and so with an inhibition against the hiring of union men and with all other stipulations which are not impossible of performance, not immoral, nor contrary to public policy. A private person seeking proposals may give notice that the bidders must be members of labor organizations or employers of none but union workmen; the acceptance of a bid made in accordance with the terms of the notice would constitute a contract the conditions whereof

will be binding. But the advertisement for proposals and the contract created by the acceptance of a proposal made pursuant thereto to do work or furnish supplies for the state stand upon a different footing. The object of advertising for proposals is to invite and secure the benefit of competitive bidding. Section 705 of the Political Code prescribes that before any contract is let the board must advertise in two daily newspapers printed in the state, one of which must be printed at the capital, for sealed proposals to furnish the supplies desired. This court, in *State v. Coad*, 23 Mont. 131, 57 Pac. 1092, quoted with approval the following language from the opinion of *Dement v. Rokker*, 126 Ill. 174, 19 N. E. 33: "Letting by contract to the 'lowest responsible bidder' necessarily implies equal opportunity to and freedom in all whose interests or inclinations might thus impel them to compete at the bidding. No one may be compelled to bid at such a letting,²⁴ but there must be entire fairness and freedom in competition. . . . The manifest purpose in requiring the contract to be let to 'the lowest responsible bidder' is to protect the state against imposition and extortion." A contract entered into by the acceptance of a bid for public work tendered pursuant to an advertisement limiting the right to bid to persons employing, or who will in the future employ, union labor only, is necessarily void; the advertisement is illegal, for it tends to defeat the very purpose it was intended by the legislature to subserve. In *Adams v. Brennan*, 177 Ill. 194, 69 Am. St. Rep. 222, 52 N. E. 314, the board of education advertised for bids for the construction of a roof for an addition to one of the free school buildings, the advertisement containing the following notice: "None but union labor shall be employed on any part of the work where such work is classified under any existing union." The bid of one Knisely was accepted, and a contract made containing a provision that none but union labor should be employed by him. A taxpayer filed a bill asking that the contract be declared void, and that the board be enjoined from carrying it out or expending money under it. One of the reasons given in the application to the board for the adoption of the clause respecting the employment of union labor was that it would do away with strikes upon school buildings and thereby save the board much annoyance and delay. The syllabi accurately state the conclusions of the court as follows: "3. Board of education cannot bind itself to give only union men employment. A board of education has no power to agree

with the representatives of labor organizations to insert in all its contracts for work upon school buildings a provision that none but union men should be employed in such work, or placed upon its payrolls. 4. A board of education has no discretion to make contracts restricting competition. That a board of education might have been of the opinion its action was for the public benefit affords no justification for limiting competition among bidders upon school building contracts, by requiring them to employ only union men in the work. 5. Stipulation ³⁵ in public contract for employment of union men only is illegal. A provision in a contract for a public school building, which requires the employment of union men only, creates a monopoly in their favor, and restricts competition by preventing contractors from employing any but union men, excluding all others engaged in the same kind of work." The like principle is the basis of the decision in *State v. Portland Natural Gas etc. Co.*, 153 Ind. 483, 74 Am. St. Rep. 314, 53 N. E. 1089.

Although the reason given at the time of the attempted cancellation is not recognized by the law as valid, yet if there is cause sufficient to render the contract void it may be shown. The defendants are not estopped to urge other defenses. An absolutely void contract cannot be made valid by the failure of public officers to object to it upon the proper ground. There is no need of precedents to sustain this statement. *State v. Board of Canvassers of Choteau Co.*, 13 Mont. 23, 31 Pac. 879, is not exactly in point. The case of *Newell v. Meyendorff*, 9 Mont. 254, 18 Am. St. Rep. 738, 23 Pac. 333, is not pertinent.

4. Was the advertisement inviting proposals published according to law? It was inserted in the "Helena Independent," a daily newspaper published at the seat of government, where it ran for twenty days prior to the time when the bids were opened and compared; but it was not printed in any other newspaper within the state. Section 705 of the Political Code reads as follows: "Before any contract is let, the board must advertise for twenty days in two daily newspapers printed in the state, one of which must be published at the seat of government, for sealed proposals to furnish any and all the supplies mentioned in the next preceding section." The advertisement appeared in but one paper printed in the state, and hence the section was not complied with. Where advertising for bids is a statutory requirement, the law is that neither the municipality nor its agents can make a contract binding upon it without compliance with the formalities so prescribed. "Bids

need not ³⁶ be called for unless the statute requires it; but if notice, advertising and similar preliminaries are required, a contract entered into without attention to these preliminaries will be held invalid. . . . The same rule applies to the letting of contracts on behalf of the state, and, before a contract can become valid and binding upon the state, the statutory formalities must be complied with": *State v. Coad*, 23 Mont. 131, 57 Pac. 1092, and cases there cited. The only argument advanced by the plaintiff against this objection to the contract is that section 705 conflicts with section 30 of article 5 of the state constitution, which ordains that "all stationery, printing, paper, fuel and lights used in the legislative and other departments of government shall be furnished, and the printing and binding and distribution of the laws, journals and department reports and other printing and binding, and the repairing and furnishing the halls and rooms used for the meeting of the legislative assembly and its committees shall be performed under contract, to be given to the lowest responsible bidder below such maximum price and under such regulations as may be prescribed by law." Counsel for the plaintiff argue that the legislative assembly had no power to require the publication of the advertisement to be made in any newspaper other than the "Helena Independent," the proprietor of which had the contract for the public printing, and that the publication of the advertisement in that newspaper constituted a compliance with the law. The position of counsel is untenable. It is apparent to us that advertisements for proposals are not public printing, within the language or spirit of section 30—a contract for advertising for proposals to furnish supplies is not required to let as a printing contract to the lowest responsible bidder; in other words, within the purview and intent of section 30, an advertisement inviting bids is not printing, the contract for which must be let to the lowest responsible bidder; a contract for doing the printing mentioned in section 30 does not include advertisements for bids. In the absence of a constitutional inhibition, the legislative assembly has the right to ³⁷ prescribe the manner of giving notice for proposals to furnish supplies. It has done so by section 705, which requires that the state furnishing board must advertise for such proposals in two daily newspapers printed in the state, one of which must be printed at the capital. This section is in no wise repugnant to the constitution.

For the reason that the advertisement for proposals was not published in accordance with the requirements of section 705 of the Political Code, the alternative writ is quashed and the proceeding is dismissed, at the costs of the plaintiff. Let judgment be entered accordingly.

Writ quashed and proceeding dismissed.

The Writ of Mandamus may issue to an officer required by law to perform some ministerial duty, but not in a matter requiring judgment or discretion to direct him in the exercise of either: *State v. Bolte*, 151 Mo. 362, 74 Am. St. Rep. 537, 52 S. W. 262; *Oliver v. Wilson*, 8 N. Dak. 590, 73 Am. St. Rep. 784, 80 N. W. 757. Mandamus does not lie against state officers to compel them to execute an executory contract between an individual and the state: *Miller v. State Board of Agriculture*, 46 W. Va. 192, 76 Am. St. Rep. 811, 32 S. E. 1007. See, also, *State v. Rickards*, 16 Mont. 145, 40 Pac. 210, 50 Am. St. Rep. 476, and note.

Public Contracts.—An agreement between the representatives of a labor union and a board of education that the latter shall insert in all contracts for work upon school buildings, a provision that none but union labor shall be employed in such work, and that none but union workmen shall be employed and placed upon the payrolls of the board, is void: *Adams v. Brennan*, 177 Ill. 194, 69 Am. St. Rep. 222, 52 N. E. 314. The rights of bidders for public contracts are considered in *Givins v. People*, 194 Ill. 150, 88 Am. St. Rep. 143, 63 N. E. 534; monographic note to *State v. Rickards*, 50 Am. St. Rep. 489-497.

JORDAN v. ANDRUS.

[26 Mont. 37, 66 Pac. 502.]

CONSTITUTIONAL LAW—**Supreme Court**—**Legislative Power to Annul Rule of Respecting the Mode of Printing Transcripts on Appeal.**—A rule of the supreme court requiring transcripts on appeal to be printed cannot be abrogated by the act of the legislature permitting them to be typewritten, though the constitution declares that the appellate jurisdiction of the supreme court shall extend to all cases at law or in equity, subject, however, to such limitations and restrictions as may be prescribed by law. (p. 401.)

APPELLATE PROCEDURE.—**An Order Refusing an Injunction Pendente Lite is Appealable under the statutes of Montana.** (p. 401.)

Strevell & Porter and George W. Farr, for the appellants.

G. W. Myers and Sidney Sanner, for the respondents.

²⁸ MILBURN, J. This cause is before the court upon the motion of the respondents to dismiss the appeal upon the grounds: "1. That the transcript on appeal herein by the said appellants is not printed nor made upon paper ten inches long by seven inches wide, nor are the typewritten pages thereof seven and one-half inches long by three and one-half inches wide, nor is said transcript otherwise or at all made in conformity with subdivision 1 of rule 6 of this court; 2. That said transcript on appeal is not in conformity with subdivision 1 of rule 7 of this court in this: that the cover thereof does not state the title of this court or of said cause, or otherwise or at all conform to said rule in relation to covers in transcripts on appeal; 3. That said transcript is made out in a slovenly manner; . . . 4. That the order of the district court from which this appeal is taken or sought to be taken, to wit, the order made and entered July 16, 1901, dissolving and vacating the temporary restraining order theretofore made in this action, is not an appealable order, within the meaning of sections 1722 and 1723 of the Code of Civil Procedure, as amended February 28, 1899, and an appeal does not lie from said order to this court."

The transcript is typewritten. Subdivision 1 of rule 6 requires transcripts to be printed. Is the rule abrogated and annulled by the act of the legislature approved March 9, 1901, known as "Senate Bill No. 101" (Laws 1901, p. 161), and providing that all transcripts, documents and papers filed in ³⁰ the supreme court in connection with any appeal taken and mentioned in the chapter in the Code of Civil Procedure upon appeals in civil actions may be printed or typewritten, at the election of the appellant? If the act is within the powers of the legislature, then the rule of this court opposed to it is null, and the motion to dismiss the appeal must be denied, so far as the first ground is concerned.

This particular question is not treated of in any opinion of any court to which we have been referred, or by any of the learned writers, many of whose works we have examined.

The constitution of this state vests the powers of government in three different and distinct departments—the legislative, the executive, and the judicial. It is not necessary to quote from the multitudinous authorities supporting the proposition that it is not lawful for any department or officer thereof to interfere with the power of any other department. It is sufficient to refer to the constitution (article 4, section 1), and to *State v. Smith*, 23 Mont. 44, 57 Pac. 449.

Section 3 of article 8 of the constitution of this state declares that "the appellate jurisdiction of the supreme court shall extend to all cases at law and in equity, subject, however, to such limitations and regulations as may be prescribed by law." Section 2 of the same article also gives the legislature power to subject the appellate jurisdiction to "regulations" and "limitations"; and section 15 of the article is as follows: "Writs of error and appeals shall be allowed from the decisions of the said district courts to the supreme court under such regulations as may be prescribed by law."

What is meant by "limitations" and "regulations"? The words, in their ordinary sense, are easily understood to mean what they in legal parlance respectively, imply, to wit, restrictions of power and rules of conduct or proceeding. The matter of this rule need not be treated as in any wise affected by the power of the legislature to establish limitations to jurisdiction. Its power to make rules of conduct or proceeding—that is, rules of procedure and practice—is all that can be considered on this ⁴⁰ motion. The question is, Has the legislature the authority under the constitution, after having enacted a Code of Civil Procedure, including a chapter establishing the procedure and practise in the matter of appeals to the supreme court, to dictate to the supreme court as to the very physical substance of the pleadings and other instruments which it may be necessary for the justices to handle, read and study in their deliberations after the cause is submitted?

What style of typewriter would the legislature permit the appellant to use? What size of type? How close shall the lines be? How thick is to be the paper? How small or large shall the pages be? What sort of ink shall the operator use in preparing the papers—record or copying? How skillful in the use of the machine shall the typewriting operator be? If the legislature has the power to dictate as to carbon copies of transcripts to be used on appeal, why has not the legislature the power, under the constitution, to force the justices to read, study and handle, during its deliberations, sometimes extending through a long period of time, papers prepared upon tissue paper, with machines making faint impressions from small type, and with such ink or carbon that they will be annoying, inconvenient, untidy and soon indecipherable? Could a regulation such as that last above suggested be within the powers of the legislature to regulate the procedure and practise on appeal to the supreme court? If not, then we cannot see how any

regulation of any character dictating to our department of the state government what kind of ink or other material substance shall be used, or how the ink shall be put on, in the manufacturing of the pleadings and papers to be handled and perused by the justices, can be valid. Might not the legislature go further, and permit the appellant to use a pen instead of a typewriter? Power to dictate to this department of government as to the use of typewritten transcripts includes the right to order us to struggle through a mass of penwritten transcripts and all other records and papers, including briefs.

Wherein would such acts be within the power of the legislature, ⁴¹ as a "regulation" of the appellate jurisdiction of this court? Would it not be simply and only an obstruction put in the way of the court, and interfering with its deliberations upon a cause or matter after its submission, and of which it has acquired jurisdiction under the constitution and the laws defining, limiting and establishing its powers, and under the lawful procedure and practise through and by no means of which the litigants had presented their several contentions to the court? We think it would be an illegal attempt to interfere with the operations of the judiciary in the performance of its duties after it had acquired jurisdiction.

It is doubtless true that the legislature has power by "regulations" to establish the procedure in civil and criminal cases—that is, the steps to be taken by the parties in an action or other legal proceeding before this court—so far as such procedure does not amount to a denial of justice, and has power to declare by law what shall be the practise on appeal—that is to say, to fix the form, manner and order of conducting and carrying on causes through their various stages according to the principles of law; but we cannot see how the power to make regulations—that is, to establish procedure and practise—includes the power to interfere with the discretion of this court in saying that the instruments filed for the reading of the justices of the court shall be printed and upon certain sized paper, to the end that causes may be conveniently heard and disposed of, and not delayed by the necessity of handling and reading papers which are inconvenient in shape and condition.

To admit power in the legislature to annul the rule referred to, and to permit the appellant, at his option, to compel the justices, desirous to learn the facts and to consider the points of counsel, to labor through a mass of carbon copies of typewritten matter, is as unwarranted as to admit that the legisla-

ture has power to authorize counsel, without the consent of court, to submit their causes without argument, oral or printed.

To require transcripts to be printed is to regulate the manner of hearing and considering, and does not interfere with any ⁴² right of the appellant to take and perfect his appeal, or to take or to omit any step in procedure, or to alter the practise—that is, the form, manner or order of conducting his appeal. The rule is only a declaration on the part of the court that, in doing its share of the labor in connection with the appeal, it must have the papers of such material substance, style and size that the justices may not have their labors increased beyond what they should be.

Under the federal constitution the supreme court of the United States has appellate jurisdiction “under such regulations as the Congress shall make.” Is there a single lawyer in the world who believes that the latter named court would recognize as valid an act of Congress such as our Senate Bill No. 101? If the answer to this question is “No,” as it must be, then by what process of reasoning can we hold this act of our legislature as binding upon this court?

Mr. Justice Field, of the supreme court of the United States, in 1859, when a justice of the supreme court of California, in *Houston v. Williams*, 13 Cal. 24, 73 Am. Dec. 565, speaking of an act amending the practise act, and requiring the opinion of the court to be given in writing, said: “If the power of the legislature to prescribe the mode and manner in which the judiciary shall discharge their official duties be once recognized, there will be no limit to the dependence of the latter. If the legislature can require the reasons of our decisions to be stated in writing, it can forbid their statement in writing, and enforce their oral announcement, or prescribe the paper upon which they shall be written, and the ink which shall be used. And yet no sane man will justify any such absurd pretension. But where is the limit to this power if its exercise in any particular be admitted? The truth is, no such power can exist in the legislative department, or be sanctioned by any court which has the least respect for its own dignity and independence. In its own sphere of duties, this court cannot be trammelled by any legislative restrictions.” This opinion of the learned justice has never been adversely criticised by any court or by any law-book writer, so far as we have been advised.

⁴³ It is true that the California constitution did not in 1859 give the legislature power to make such regulations as are pro-

vided for in our constitution, but, in view of the inherent powers of our court, which we do not believe the constitution takes away and reposes in the legislature, we think the language of Justice Field appropriate to the matter before us; and we can reasonably believe that the supreme court of the United States would adopt the words and thoughts of Mr. Justice Field if Congress should assume to act under the powers conferred by the constitution, and should enact a statute similar to our Senate Bill No. 101.

Although the cases were not upon facts identical with those in the case at bar, yet the views expressed by the court of Indiana in *In re Petition of Leach*, 134 Ind. 665, 34 N. E. 641, and by the supreme court of Illinois in *In re Application of Day*, 181 Ill. 73, 54 N. E. 646, go far to support what we have said above as to the inherent powers of this court, which are beyond the power of the legislature to control. In the latter case it was held that a statute overriding the rules of the court respecting the admission of attorneys, by requiring the admission of any person who began to study law before a specified time, provided he has obtained a diploma from a law school in the state after a specified period of attendance, or has passed a satisfactory examination before an examining board after a prescribed course of study, is an unconstitutional assumption of power properly belonging to the courts.

Senate Bill No. 101 is unconstitutional and of no binding force upon this court.

Examination of the transcript shows that there is nothing in the second ground of the motion.

As to the third point, it is sufficient to say that the interlineations and general appearance complained of are very apparent, and are such as will not appear in a printed transcript; but, on account of the fact that the appeal is to be dismissed upon the first ground of the motion, it is not necessary to say more as to this, the third ground.

⁴⁴ The fourth ground is not tenable. The order appealed from is not one dissolving a mere restraining order, but one refusing an injunction *pendente lite*, and is appealable. The case of *Wetzstein v. Boston etc. Min. Co.*, 25 Mont. 135, 63 Pac. 1043, does not apply, except so far as it shows the difference between a restraining order and an injunction *pendente lite*.

As appellants in good faith complied with the act which attempts to grant the privilege of filing typewritten transcripts

with carbon copies, they should not be called upon to suffer the loss of all opportunity to appeal.

Therefore, this appeal is dismissed without prejudice to a motion to reinstate if a transcript be prepared, served and filed in accordance with rules 6 and 9 of this court within sixty days from this date.

Dismissed.

Rules of Court in contravention of the organic or statute law of the state are to that extent void: *State v. Gideon*, 119 Mo. 94, 24 S. W. 748, 41 Am. St. Rep. 634, and monographic note. However, the three departments of government are distinct from each other, so far as any direct control or interference is concerned: *Greenwood Cemetery etc. Co. v. Rountt*, 17 Colo. 156, 31 Am. St. Rep. 284, 28 Pac. 1125. And it has been held that the legislature cannot require the supreme court to state the reasons for its decisions in writing, the constitutional duty of the court being discharged by the rendition of its decisions: *Houston v. Williams*, 13 Cal. 24, 73 Am. Dec. 565.

SPELMAN v. GOLD COIN MINING AND MILLING CO.

[26 Mont. 76, 66 Pac. 597.]

PRINCIPAL AND AGENT.—The Powers of an Agent cannot be Enlarged by his unauthorized representations and promises. (p. 405.)

MEDICAL SERVICES TO ANOTHER—Implied Promise to Pay for—When does not Exist.—An implied promise on the part of one who requests performance of medical or surgical services to another to pay for them does not arise unless the relation of the patient to the person making the request is such as raises a legal obligation on his part to call in a physician and pay for his services. (p. 405.)

MINING COMPANIES—Authority of General Manager to Employ Physicians for Injured Employés.—If employés of a mining corporation are injured by an accident for which it is not liable, its general manager has no implied authority on its behalf to employ physicians or surgeons to attend them, or to bind it by a promise to pay for such services. (p. 406.)

MASTER AND SERVANT—Medical or Surgical Aid—Duty to Furnish.—An employer does not owe to his servant or employé a duty to furnish medical or surgical aid to him or to nurse him when sick, disabled, or injured while working for the master or employer. (p. 406.)

MINING CORPORATIONS—General Manager—Powers of.—Unless the limits of his authority are shown to have been enlarged, the duties of the general manager of a mining corporation are confined to the transaction of the business of the corporation as distinguished from its mere ethical duties and consequent imperfect

obligations or supposed charities. The fact that a certain person is manager of such a corporation does not in itself impose authority on him to bind it in matters other than those of business affairs. (p. 408.)

O'Leary & Maiden, for the appellant.

J. R. Boarman, for the respondent.

⁷⁷ PIGOTT, J. This was an action to recover judgment for the reasonable value of services alleged to have been rendered by the plaintiff and one McKenzie, as physicians and surgeons, at the special instance and request of the defendant, a corporation organized for the purpose of mining and engaged in that business in the county of Deer Lodge, Montana. The defendant denied that it ever employed the plaintiff or McKenzie, and traversed the allegation of the complaint touching the reasonable value of the services. The evidence disclosed or tended to show the existence of the following facts: One Shafner was the president of the defendant, one Loomis its secretary and general manager, and one Beaton its assistant manager and foreman. On January 13, 1898, Beaton and two other employes of the defendant were injured by the explosion of a blast in the Gold Coin mine, owned by the defendant and in which they were then working. On the same day the men were taken to a hospital in Anaconda, where they received at the hands of the plaintiff and McKenzie medical and surgical attendance and treatment for several months. The hospital had no contract with the defendant, nor were there any relations between it and the defendant. The plaintiff was surgeon to the hospital. After the first examination of the men the plaintiff suggested to Beaton the employment of a specialist in diseases of the eye and that it would be well to call in one Grigg. To this Beaton assented, saying that the defendant would pay all the expenses incident to the treatment of himself and of the other men. Thereupon the plaintiff called in Grigg, who gave to the eyes of the men such attention as was necessary. On the 14th, which was the day after the accident, Loomis telegraphed to the plaintiff to spare no expense in giving Beaton the best possible nursing and attention, and if the other men who had been injured needed surgical and hospital treatment, to provide it, and he would pay all the expense. Thereafter, and while the plaintiff was professionally attending Beaton and his companions, Loomis orally assured ⁷⁸ the plaintiff and McKenzie that the defendant would pay them. McKenzie assigned his account to the plaintiff. Grigg's

bill for the services rendered by him was paid in part by Beaton, and in part by a check on some part of which appeared the name of the defendant, Grigg testifying that he did not know where the name of the defendant appeared thereon, but it was his "impression that it was signed by the Gold Coin Mining Company per some one else's order." On motion of the defendant the court granted a nonsuit, for the reason that no authority had been shown in either Loomis or Beaton to employ the plaintiff or McKenzie on behalf of the defendant, to attend the men injured, that the evidence did not show that the employment of the plaintiff or his assignor came within the scope of the authority of either Loomis or Beaton, and that therefore the plaintiff failed to show the liability of the defendant. The order granting the motion was followed by a judgment in favor of the defendant, from which and from an order refusing a new trial the plaintiff appeals.

Several errors are specified, but the question presented by the order granting the nonsuit is the only one that requires consideration. The plaintiff contends that Loomis, the general manager of the defendant, was, by virtue of his office, empowered to employ the plaintiff and McKenzie in the name of his principal and to bind it by his promise to pay them. He insists that authority to employ physicians and surgeons to attend upon miners injured while engaged in working for the defendant was impliedly delegated to Loomis by his appointment to the office of general manager, and that neither express authority nor subsequent ratification by the company need be shown; and that the defendant paid a part of Grigg's bill, thereby ratifying the employment of the plaintiff. It is argued that Loomis, in his capacity of secretary and general manager of the defendant, was its representative, and in the transaction of its ordinary affairs might do whatever the corporation could do within the scope of its powers, and that the general manager of a mining company must necessarily receive full power to act for the ⁷⁹ company in all emergencies. In short, the contention is that the law presumes the general manager of a mining corporation to be clothed with the power which Loomis attempted to exercise, and that courts must take judicial notice of such power.

A principal is bound only by the authorized acts of his agent, and prior authority or subsequent ratification must be shown in order to render the principal answerable *ex contractu* for the conduct of his agent. The agent's authority may be either ex-

press or implied; but the act done or the promise made by the agent must be within the powers expressly or impliedly delegated to him; though the act was not authorized at the time it was done, it may be ratified subsequently by a competent principal. Powers of the agent cannot be enlarged by his unauthorized representations or promises. The principal is bound, however, by the acts of the agent who is held out by him as possessing authority to do the act which he does; in such case his acts are the principal's when done under such apparent authority, and the principal is estopped to deny the agent's authority when the person dealing with the agent relied upon the holding out. The implication of a promise on the part of one who requests the performance of medical or surgical services for another to pay for them does not arise "unless the relation of the person making the request to the patient is such as raises a legal obligation on his part to call in a physician and pay for the services" (*Meisenbach v. Southern Coöperage Co.*, 45 Mo. App. 232; *Boyd v. Sappington*, 4 Watts, 247; *Crane v. Baudonine*, 55 N. Y. 256); to make him liable there must be an express promise or engagement to pay by the one who called in the surgeon or by his authorized agent. These general rules are applicable to corporations as well as to natural persons: *Butte & Boston Consol. Min. Co. v. Montana Ore Purchasing Co.*, 21 Mont. 539, 52 Pac. 375; *Trent v. Sherlock*, 24 Mont. 255, 61 Pac. 650. Both alike are bound by the acts of their agents done within the scope of the authority ostensibly delegated.

In the case at bar certain employes of the defendant, while so working in its mine, were injured by the explosion of a blast. It does not appear that the company was in any wise at fault—the employment of the plaintiff by Beaton and Loomis, who assumed to act in the name of the company, being (of itself) no evidence that the defendant was negligent or that in their opinion it was responsible for the accident. The men were removed to a hospital with which the defendant had no connection or contract whatever, and were there treated by physicians and surgeons to whom the general manager of the defendant made promises to the effect that the defendant would pay them. There was nothing tending to show that the general manager had theretofore assumed so to bind the defendant; there was nothing to show that the corporation had in any manner whatever expressly delegated to the general manager authority to exercise such power, nor was there any evidence that general

managers of mining corporations habitually exercised that power. Can the court declare, upon this state of facts, that the general manager of the defendant possessed authority to bind the defendant by employing physicians and surgeons? We think not. While there can be no doubt of the implied power of a corporation of the class to which the defendant belongs "to incur expense on account of injuries received by its employes in the line of their employment, in the absence of any express statutory grant of such power" (5 Thompson on Corporations, sec. 5840), the law unquestionably is that such a corporation does not owe to its employes any implied legal duty to do so. Without attempting to enumerate every duty of the master, we may say, in general terms, that a corporation, like any other master, discharges its primary duties as master to the servant when it furnishes him with a reasonably safe place in which to work, reasonably safe tools with which to work, and uses reasonable care in selecting fellow-servants, or, rather, is free from negligence in these three respects. It would not seriously be asserted that a natural person owes to his servant or employe the legal duty to furnish medical or surgical aid to him or to nurse him when sick or disabled, or when injured while working for the master ⁸¹ or employer—indeed, we apprehend the law does not impose such obligation upon him in any event without an agreement by which he assumes such burden. For instance, a servant suffers a bodily injury through the actionable negligence of the master; although the master must answer to the servant in damages for all loss proximately resulting, including physicians' and surgeons' charges, yet the law does not require him to engage their services or to pay them for performing the services—he may, if he chooses, employ physicians, surgeons and nurses and promise to pay them, and of course he would then be liable directly to those employed. Whether or not in such a case as the one last suggested the general manager of a mining company can bind his principal is not necessary to be decided upon this appeal. If he can, the power must rest upon the assumption or theory that in appointing a general manager the company impliedly delegates to him authority to lessen the extent of the injuries inflicted by the principal's wrong, and thereby diminish the amount of damages for which the latter would otherwise be liable. As has been said, there is nothing in the case at bar to indicate that the defendant was at fault, or that it had agreed with the wounded men to provide surgeons or physicians for them in

case of accident. If the defendant's directors had met and employed the plaintiff and McKenzie to attend the wounded men, they would have bound the defendant; but the directors would not thereby have performed a duty imposed by law upon them or upon the defendant. Beyond doubt the corporation through its board of directors—its governing body—possessed the right at any time to delegate the exercise of this power to any officer or person. Now, the general manager represents the corporation in all matters falling within the scope of the powers actually conferred or which he is held out by the company to possess; “whenever a corporation appoints a general manager or superintendent, by whatever name called, it, by that very fact, impliedly holds him out to the public as possessed of the authority to bind it by contracts which are necessary, proper, or usual to be made in the ordinary prosecution ⁶² of its business”: 4 Thompson on Corporations, sec. 4850; Georgia Military Academy v. Estill, 77 Ga. 409. In Trent v. Sherlock, 24 Mont. 255, 61 Pac. 650, we said: “No principle of law is more clearly settled than that an agent to whom is intrusted by a corporation the management of its local affairs, whether such agent be designated as president, general manager, or superintendent, may bind his principal by contracts which are necessary, proper, or usual to be made in the ordinary prosecution of its business. . . . The fact that he occupies, by the consent of the board of directors, the position of such an agent, implies, without further proof, the authority to do anything which the corporation itself may do, so long as the act done pertains to the ordinary business of the company. . . . Even where the contract in question pertains to matters without the ordinary course of business, but within the power of the corporation—that is, such as is not prohibited by its charter or by express provision of law—the authority of the agent may be established by proof of the ‘course of business between the parties themselves; by the usages and practice which the company may have permitted to grow up in its business; and by the knowledge which the board, charged with the duty of controlling and conducting the transactions and property of the corporation, had, or must be presumed to have had, of the acts and doings of its subordinates in and about the affairs of the corporation.’ . . . ‘There is no reason, and can be no legal principle, which will put the agent of a corporation on any different footing than the agent of an individual, in regard to the same business.’” He cannot, how-

Swift, 60 Neb. 696, 83 Am. St. Rep. 552, 84 N. W. 86. See, also, Pittsburgh etc. R. R. Co. v. Sullivan, 141 Ind. 83, 50 Am. St. Rep. 313, 40 N. E. 138. And compare Cairo etc. R. R. Co. v. Mahoney, 82 Ill. 73, 25 Am. Rep. 299; Toledo etc. R. R. Co. v. Rodrigues, 47 Ill. 188, 95 Am. Dec. 484.

HUGHES v. GOODALE.

[26 Mont. 93, 66 Pac. 702.]

JUDGMENTS—When Voidable or Void.—The orders and judgments of a court, within its jurisdiction, may be voidable for error or irregularity, but such error or irregularity does not of itself make them void. (p. 414.)

GUARDIAN'S SALE—When not Void for Failure to Give Bond.—Though a statute requires a guardian, before making a sale of the property of his ward, to give a specified bond for the application of the proceeds, a sale made without giving such bond, but subsequently confirmed by the court, is not void. (pp. 417, 420.)

Suit to determine whether the plaintiff was the owner in fee of certain real property purchased by him at a guardian's sale. Defendants were the guardian who made the sale and his minor ward. Apparently, the only question was whether the sale was void because the guardian, before making it, failed to give the special bond referred to in the opinion of the court. Judgment for the defendants and the plaintiff appealed.

H. Lowndes Maury, for the appellant.

William D. Burbage, for the respondent.

⁹⁴ **PIGOTT, J.** The single question arising upon the agreed statement is whether the omission of the guardian to give a special bond before the sale invalidated the sale authorized by the order. ⁹⁵ Both parties assume that the provisions of section 387 of the probate practise act (Comp. Stats. 1887) require such a bond to be given whenever the sale of a ward's real estate is directed to be made. Before proceeding to consider the arguments of counsel based upon this assumption, we deem it not improper to suggest a possible solution of the ultimate question upon a ground not discussed by counsel. It might be argued, with plausibility at least, that section 387 does not require a sale bond to be given in all cases. This section provides that "every guardian authorized to sell real estate must, before the sale, give bond to the probate judge [district judge], with sufficient surety, to be approved by him, with conditions

to sell the same in the manner, and to account for the proceeds of the sale, as provided for in this chapter and chapter 7 of this title." Section 388 provides that "all the proceedings under the petitions of guardians for sales of property of their wards, making orders, rejecting or confirming sales, and reports of sales, ordering and making conveyances of property sold, accounting and the settlements of accounts, must be had and made as required by the provisions of this title concerning estates of decedents, unless otherwise specially provided in this chapter." Section 407 declares that the provisions relative to estates of decedents, so far as they pertain to the practise in the probate or district court, apply to proceedings touching estates of minors under guardianship. Now, section 76 of chapter 3 of the title referred to in section 388, *supra*, after imposing upon the district judge the duty to require an additional bond whenever the sale of lands belonging to a decedent is ordered, proceeds: "But no such additional bond must be required when it satisfactorily appears to the court that the penalty of the bond given before receiving letters, or of any bond given in the place thereof, is equal to twice the value of the personal property remaining in, or that will come into, the possession of the executor or administrator, including the annual rents, profits, and issues of real estate, and twice the probable amount to be realized on the sale of the real estate to be sold." If section ⁹⁶ 387 is to be read with and interpreted in the light of section 76, a special bond need not be required of a guardian when, in the opinion of the court, the penal sum mentioned in his general bond is sufficiently large to cover the items enumerated in section 76, and affords ample security to the ward for the proceeds of the intended sale. If this theory be correct, "it is not otherwise specially provided" in the chapter relating to guardians that they must always give a bond before making sales of real estate; hence in the case at bar the guardian was under no obligation, so far as the record discloses, to furnish a special bond, for the presumption that the court below properly refrained from requiring a special bond must be indulged. We merely mention this as a possibly correct construction of the statutes. Counsel have not suggested it and we do not decide that the theory advanced is the correct one, nor intimate an opinion upon it, its determination being unnecessary to a decision. For the purposes of this appeal we shall treat section 387 as unaffected in this regard by section 76.

The contention of counsel for the defendant is that section 387 requires a guardian to give a special bond in every case, that the provision is mandatory, and that an omission so to do renders the sale void. Counsel for the plaintiff insists that the requirement is directory only.

The question presented is one of first impression in this court. In *Power v. Lenoir*, 22 Mont. 169, 56 Pac. 106, it was held that the giving of the general bond required by a guardian by section 358 of the probate practise act (Comp. Stats. 1887), is indispensable to the validity of his acts so far as the rights of the ward are concerned, the section providing that "before the order appointing any person guardian under this chapter takes effect, and before letters issue, the judge must require of such person a bond to the minor, with sufficient sureties, to be approved by the judge, and in such sum as he shall order, conditioned that the guardian will faithfully execute the duties of his trust according to law; and the following conditions shall form a part of such bond without ^{or} being expressed therein: 1. To make an inventory of all the estate, real and personal, of his ward, that comes to his possession or knowledge, and to return the same within such time as the judge may order; 2. To dispose of and manage the estate according to law and for the best interest of the ward, and faithfully to discharge his trust in relation thereto, and also in relation to the care, custody, and education of the ward; 3. To render an account, on oath, of the property, estate, and moneys of the ward in his hands, and all proceeds or interest derived therefrom, and of the management and disposition of the same, within three months after his appointment, and at such other times as the court directs, and at the expiration of his trust to settle his accounts with the probate judge, or with the ward, if he be of full age, or his legal representatives, and to pay over and deliver all the estate, moneys and effects remaining in his hands, or due from him on such settlement, to the person or persons who are lawfully entitled thereto. Upon filing the bond, duly approved, letters of guardianship must issue to the person appointed. In form, the letters of guardianship must be substantially the same as letters of administration, and the oath of the guardian must be indorsed thereon that he will perform the duties of his office as such guardian according to law." In that case we said: "Section 358 of our probate law plainly and positively provides that, before the order appointing any person guardian takes effect, and before letters issue, the judge must

require of such person a bond to the minor, with sufficient sureties. The intention of the legislature could hardly have been more plainly manifested. From the other sections of the statute cited *supra*, it appears that it did not even deem it wise to allow the parent to relieve the guardian of this duty by testamentary direction; for though a provision is made recognizing the right of parents to select by will the person to whom they wish to intrust the care of their children and their estates (section 351, *supra*), yet it requires such person so selected (section 362) to give bond and qualify as other guardians. It is not, therefore, the recognition ^{as} by any court of the relation of guardian and ward that gives it validity, but the fact that the relation has been properly established by a compliance with the requirements of the law. A person who purchases the property of a minor, or who seeks to divest him of title to his property, will not be heard to say that the minor is estopped and concluded by the irresponsible acts and doings of some person who has presumed to act as his guardian without first giving the minor the protection and security the law requires for him. . . . The latter [the ward] is, so to speak, the special favorite of the courts, and the courts will always see that his rights are protected." The decision was that the order appointing a guardian is without effect unless and until the bond required by section 358 shall have been given. Section 75 of the probate practise act (Comp. Stats. 1887) requires that "every person to whom letters testamentary or of administration are directed to issue must, before receiving them," execute a bond. In *In re Craigie's Estate*, 24 Mont. 37, 60 Pac. 495, we intimated, by way of argument, that the failure of the person appointed administrator to give a bond does not ordinarily or usually render void the letters of administration issued to him. It is proper to observe that section 75 requires a person to whom letters are directed to issue to execute a bond before receiving them, but does not declare that the order is ineffectual unless the bond be given. The decision in the *Craigie* case was to the effect that the failure of a public administrator who had duly qualified by giving bond and taking oath to file an additional bond required by the district judge as further security for the interest of an estate in his hands, did not, *ipso facto*, create a vacancy in the office of public administrator, although the statute declared that upon failure of any public administrator to give such bond as might be required by a probate judge, his office should become vacant. Neither of these cases announces a rule which must govern the decision of the case at bar.

If the omission to give a sale bond was sufficient to deprive the court of jurisdiction, the judgment must be affirmed; in ⁹⁹ other words, if the order of sale was invalidated by the omission to give a special bond, then by the sale the plaintiff took no title as against the minors. If, upon the other hand, the court was clothed with jurisdiction to make the order of sale, and the omission to give the special bond did not deprive the order of its legal force, then the plaintiff, by virtue of the confirmation of the sale, followed by the deed of conveyance, acquired all the title which the minors had to the property.

The orders and judgments of a court within its jurisdiction may be voidable for error or irregularity, but such error or irregularity does not, of itself, avoid the orders or judgments. This rule applies to courts of general common-law jurisdiction, to courts of equity, and to inferior courts of limited powers; it is applicable to all courts alike. Whenever it appears that the act done, the order made, or the judgment rendered was within the scope of the power conferred, jurisdiction must be admitted, and, unless that jurisdiction is shown to have been lost, the act, order, or judgment cannot be characterized as a nullity. Did the omission of the guardian to give a special bond render ineffectual the order of sale and the confirmation thereof, thereby depriving the court of jurisdiction in the premises? That the defendant was the duly appointed, qualified and acting guardian is conceded; it must be presumed that upon a proper petition and after a hearing the court ordered the guardian to sell the lands of his wards; in pursuance of that order the sale was made and confirmed; a deed of conveyance was thereupon duly executed by the guardian and delivered to the plaintiff. That the district court had jurisdiction of the class of cases or proceedings to which the one at bar belongs, and therefore of the subject matter of this proceeding, and had jurisdiction of the persons of the wards, is also conceded. Its jurisdiction was regularly invoked. In making the order of sale its jurisdiction was duly exercised. As we have said, the sale was not void unless the omission to give a special bond rendered the order of sale ineffectual; that is to say, unless the court lost jurisdiction of the subject matter by the failure of ¹⁰⁰ the guardian to execute a special sale bond, the plaintiff by the sale acquired title to the lands. No mere irregularity, however great, can avail the defendant or his wards in such an attack as is here made. Such defect or irregularity cannot be inquired into by means of a collateral action.

The object sought to be attained by section 387 is the protection of the financial interests of the ward. For any loss which a decedent's estate may suffer by reason of the failure of an administrator properly to account for and pay over the proceeds of a sale of land, the sureties on his general bond are certainly answerable. This appears by sections 75 and 76, *supra*, and we perceive no reason why, under the statutes of Montana, any different rule should be applied to sureties on the general bond of a guardian. By section 358 the guardian must execute to the minor a bond with sufficient sureties in such sum as the judge may order, conditioned for the faithful performance of his trust according to law. As appears from the quotation hereinbefore made, the following implied conditions form a part of the bond: "2. To dispose of and manage the estate according to law and for the best interest of the ward, and faithfully to discharge his trust in relation thereto, and also in relation to the care, custody, and education of the ward; 3. To render an account, on oath, of the property, estate, and moneys of the ward in his hands, and all proceeds or interest derived therefrom, and of the management and disposition of the same, within three months after his appointment, and at such other times as the court directs, and at the expiration of his trust to settle his accounts with the probate judge, or with the ward, if he be of full age, or his legal representatives, and to pay over and deliver all the estate, moneys, and effects remaining in his hands, or due from him on such settlement, to the person or persons who are lawfully entitled thereto." Among the powers and duties of the guardian are the following: To pay all debts of the ward out of his personal estate and the income of his real estate, but, if these sources are insufficient, then out of his real estate, upon obtaining an ¹⁰¹ order for its sale, "and disposing of the same in the manner provided in this title for the sale of real estate of decedents" (section 367); he must, if the income and profits of the estate be insufficient for the purposes, sell the real estate of his ward upon obtaining an order of the court therefor, and apply so much of the proceeds as may be necessary to the maintenance and support of the ward and his family (section 369); and to sell the ward's real estate when it appears for the benefit of the ward to do so, and put the proceeds out at interest or otherwise reinvest the same (section 377). These powers are conferred and these correlative duties are imposed upon guardians generally, to be exercised and performed whenever the conditions contemplated by the statute arise; in brief, whenever it ap-

pears either necessary or for the benefit of the ward that his real estate or some part of it should be sold, the court may grant an order therefor (section 386). To obtain an order to sell, to sell and to account for the avails of the sale ordered, is one of the general duties of the guardian. We think the sureties on such bond of the guardian are liable for any loss which the ward may suffer by reason of the guardian's failure faithfully to execute the duties of his trust, among which are those pertaining to sales of real estate, and that they are, consequently, liable for his default with respect to the proceeds of such sales. Section 402 of the probate practise act (Comp. Stats. 1887) authorizes the judge to require a new bond to be given by a guardian whenever he deems it necessary. He may at any time, even after sale, require a new or additional bond. These provisions illustrate the design and show the intention of the legislative assembly in enacting section 387. This section provides no penalty for the omission to require or give a special bond, nor does it declare that the order of sale depends upon the performance of such a condition subsequent. Nowhere does the statute declare that if a special bond be not given the sale shall not be made, or, if made, shall be void. It is not provided that the order of sale becomes effective only when such special bond is given. In *Stewart v. Bailey*, 28 Mich. 102 251, the statute required a special sale bond and provided that in case of an action relating to any estate sold by a guardian in which the ward should contest the validity of the sale, the sale should not be avoided on account of any irregularity in the proceedings, provided it should appear, among other things, that the guardian gave a special sale bond. This was tantamount to declaring a sale made without bond to be voidable in such an action, and the court so held. The same statutes governed the decision in *Ryder v. Flanders*, 30 Mich. 336. The interpretation of similar statutes was involved in *McKeever v. Ball*, 71 Ind. 398, *Weld v. Johnson Mfg. Co.*, 84 Wis. 537, 54 N. W. 335, 998, *Bachelor v. Korb*, 58 Neb. 122, 76 Am. St. Rep. 70, 78 N. W. 485, and in *Goldsmith v. Gilliland* (C. C.), 23 Fed. 645. In *Barber v. Hopewell*, 1 Met. (Ky.) 260, the statute in force provided that if the guardian failed to give the special bond, the sale should not be made, and "any decree, sale, or conveyance thereof shall be void"; and the court held that a sale of lands without giving the special bond rendered the sale a nullity as to the ward. These decisions, owing to the difference between our statutes and those under which they were rendered, are not in

point. Other cases seemingly in favor of the defendant's position may readily be distinguished; for example, *Williams v. Morton*, 38 Me. 47, 61 Am. Dec. 229, holds that a conveyance of land by the guardian of a ward, under order of a court of probate, vests no title in the grantee unless the guardian shall have given the sale bond required by statute; but the court so held for the reason that in Maine the general bond of the guardian did not stand as security for the proper application of the proceeds of a sale of real estate. Such was the condition, likewise, in *Vanderburg v. Williamson*, 52 Miss. 233. This is also the basis of the decision in *Lyman v. Conkey*, 1 Met. (Mass.) 317.

We are of the opinion that the omission of the court to require, ¹⁰³ and of the guardian to give, the special sale bond in the case at bar was a mere irregularity in no wise affecting or impairing the jurisdiction of the court which ordered and confirmed the sale. As has already been said, the general bond of the guardian stands as security for the proper application of the proceeds of the sale; the court was clothed with power to entertain the petition praying for the sale; it had jurisdiction of the subject matter and of the parties; it made the order of sale; the property was sold, the sale was confirmed, and a conveyance executed. The statute omits to denounce as void, for want of a special bond, a sale made pursuant to such an order. The sale was not void. Many cases support this conclusion. In *Palmer v. Oakley*, 2 Doug. 433, 47 Am. Dec. 41, the following language is used: "The last objection to the regularity of the proceedings by the guardian in conducting the sale is, that the notice of sale given was insufficient, and was given before the bond was executed. The statute requires that, before making sale of any real estate by a guardian, a bond shall be given with sureties, and thirty days' notice of the intended sale. An oath is also required. The requirement in respect to the bond and notice is contained in a proviso, and may be considered as a limitation or restriction upon the authority to sell. But does the neglect on the part of the guardian to comply with these several provisions of the statute render the sale absolutely void, and can it affect the rights of an innocent bona fide purchaser, claiming through the decree authorizing the sale? I think the rights of such a purchaser, especially after the lapse of so many years, are not to be disturbed in consequence of the failure of the guardian to perform acts in pais subsequent to the decree of sale. The acts of the guardian are, in legal contemplation, the

acts of the ward, whom he represents; and it cannot now be permitted to the ward to come in and allege the nonfeasance of his guardian, to disturb a title derived from him through such, his legally constituted representative. All that a purchaser at judicial sale is bound to look to with a view to his protection is to see that the court ¹⁰⁴ by whom the sale was authorized was empowered to make the decree. If the court had the power, the failure of the guardian, as in this case, to fulfill certain directions which the law imposed on her, should not and cannot prejudice the rights acquired by such purchaser. If the ward is prejudiced by any neglect on the part of the guardian in the execution of the trust reposed in her, his remedy is upon her bond. It never could have been contemplated by the legislature that the validity of a sale should be made to depend upon the observance of those provisions of the law, which are in their nature directory to the guardian. If such a rule were to obtain, but few purchasers would be found at judicial sales; for but few would incur the hazard of purchasing and paying their money when the purchase so made may, at the distance of ten or fifteen years, be held void, in consequence of a noncompliance by a guardian with the requisitions of the statute. Such a rule would also operate injuriously on the ward, as upon every sale made the purchaser would take into account the hazard he incurs. The best interests of infants require that no unnecessary obstacles should be thrown in the way of obtaining the best possible price for their estates when sold. If a wrong is done them by their guardians, they have a full and ample remedy. In the case of *Perkins v. Fairfield*, 11 Mass. 227, it was held that a failure by an administrator to give the bond required by the act of Massachusetts of 1783 before the sale of real estate of his intestate would not invalidate a title derived through such administrator."

In *Bunce v. Bunce*, 59 Iowa, 533, 13 N. W. 705, the court said: "The remaining objections—the want of a sale bond, and the alleged want of approval of the sale—may be considered together. The statute provided that, before a sale can be executed, the guardian must give security: Revision, sec. 2556. The statute also required that the sale must be approved: Revision, sec. 2558. In the absence of a sale bond, it would doubtless be error to approve the sale; but, where jurisdiction has attached, and the sale has been approved, it cannot, we think, be successfully attacked in a collateral proceeding ¹⁰⁵ by alleging the want of a sale bond. The question raised must be

deemed to have been passed on, and whether correctly or incorrectly, the court cannot, we think, in a collateral action, inquire." This was approved in *Hamiel v. Donnelly*, 75 Iowa, 93, 39 N. W. 210. The same doctrine or principle is announced in *Perkins v. Fairfield*, 11 Mass. 227; *Lockhart v. John*, 7 Pa. St. 137; *Merklein v. Trapnell*, 34 Pa. St. 42, 75 Am. Dec. 634; *Dixey v. Laning*, 49 Pa. St. 143; *Foster v. Birch*, 14 Ind. 445; *Dequindre v. Williams*, 31 Ind. 444. In *Arrowsmith v. Harmoning*, 42 Ohio St. 254, the court, in approving *Mauarr v. Parrish*, 26 Ohio St. 636, said: "The decision in *Mauarr v. Parrish*, 26 Ohio St. 626, was right. The probate court had jurisdiction of the subject matter—i. e., it was clothed with authority to order the sale of the lands of a minor on the petition of his guardian; and it is fair to say from the record that notice of filing the petition, provided for by the statute, had been served on the minor, before any order was made in the proceeding, in the manner in such statute provided; and hence, when the order of sale was made, and also when the sale was confirmed, the probate court had not only jurisdiction of the subject matter, but also the parties. This being true, the order of sale and the order of confirmation, although they may have been erroneous, were not void. 'The judgment or final order of a court having jurisdiction of the subject matter and parties, however erroneous, irregular, or informal such judgment or order may be, is valid until reversed or set aside, . . . within which rule the orders of probate courts are classed: *Shroyer v. Richmond*, 16 Ohio St. 455. If the judgment or order is erroneous, it may be reversed; if it is irregular or informal, it may be corrected on motion; in neither case, however, is it subject to collateral attack': *Wehrle v. Wehrle*, 39 Ohio St. 365. True, *Mauarr v. Parrish*, 26 Ohio St. 636, is very briefly reported on the question we are considering. ¹⁰⁶ But the strength of an opinion is not to be determined from its length. Frequently cases are disposed of by the application of principles so firmly settled that the citation of authorities in support of them would be a work of supererogation. The judge delivering the opinion in *Mauarr v. Parrish*, 26 Ohio St. 636, probably thought the case belonged to that class, and hence the brevity of the report; but the ground of the decision is clearly indicated—that is, that, the court having jurisdiction of the subject matter and parties, the order of sale and the order of confirmation, though they may have been erroneous, were not void—and that is sufficient. The record and a brief on each side of the case have remained on

file in this court, and we have no doubt that the question received the careful consideration, as in its decision, in the way stated, it received the concurrence, of every member of this court. And although cases in apparent opposition to *Mauarr v. Parrish*, 26 Ohio St. 636, have been cited, yet nearly all of them are clearly distinguishable from it, when regard is had to the statutes on which they were based; and *Mauarr v. Parrish*, 26 Ohio St. 636, is fully supported by *Watts v. Cook*, 24 Kan. 278; *Bunce v. Bunce*, 59 Iowa, 533, 13 N. W. 705; *Lockhart v. John*, 7 Pa. St. 137; *Merklein v. Trapnell*, 34 Pa. St. 42; *Appeal of Thorn*, 35 Pa. St. 47; *Dixey v. Laning*, 49 Pa. St. 143." *Watts v. Cook*, 24 Kan. 278, is also directly in point. The statute of Kansas (Comp. Laws 1879, c. 46, sec. 15) provided that before any guardian's sale of lands "can be made or executed, the guardian must give security to the satisfaction of the court, the penalty of which shall be at least double the value of the property to be sold, . . . conditioned that he will faithfully perform his duties in that respect, and account for and apply all moneys received by him under the direction of the court." It was said (Mr. Justice Brewer, Mr. Chief Justice Horton, and Mr. Justice Valentine, composing the court): "The authorities differ as to the validity of guardians' sales in the absence of security. Some hold such sales void (*Williams v. Morton*, 38 Me. 47, 61 Am. Dec. 229), and others merely erroneous: *Lockhart v. John*, 7 Pa. St. 137; ¹⁰⁷ *Perkins v. Fairfield*, 11 Mass. 227; *Foster v. Birch*, 14 Ind. 445. We are inclined to believe the latter the true rule. Probate courts should cautiously observe the provisions of the section quoted, and are greatly negligent in permitting sales on mortgages by guardians without security; yet we cannot hold that the failure to give security deprives the court of jurisdiction. It is an error of a court having competent and full jurisdiction, subject to reversal or avoidance by due proceedings. The absence of the security did not render the proceedings void, but only irregular." This case was approved in *Howbert v. Heyle*, 47 Kan. 58, 27 Pac. 116, although the judge writing the opinion entertained the view that the decision in *Mauarr v. Parrish*, 26 Ohio St. 636, was against the great weight of authority.

We are satisfied, upon reason as well as by the weight of authority, that the provisions of section 387 are directory, and hence that the sale was not void because the guardian omitted to give the special bond required thereby. The judgment must, therefore, be reversed and the cause remanded, with directions

to the court below to render judgment in favor of the plaintiff, and it is so ordered.

Guardian's Sale.—A statute providing that a guardian licensed to sell real estate "shall, before the sale, give bond or sureties, to be approved by such judge," is mandatory; and where the bond given is not approved by the judge of the district court, the guardian's sale of his ward's real estate is void: *Bachelor v. Korb*, 58 Neb. 122, 76 Am. St. Rep. 70, 78 N. W. 485; *Tracy v. Roberts*, 88 Me. 310, 51 Am. St. Rep. 394, 34 Atl. 68. Compare *Palmer v. Oakley*, 2 Doug. (Mich.) 433, 47 Am. Dec. 41.

STATE v. WRIGHT.

[26 Mont. 540, 69 Pac. 101.]

MANDAMUS does not Lie to Compel a Clerk of a Court to Issue an Alias Execution or Order of Sale, because there is a complete and adequate remedy by motion in the cause in which the clerk is desired to act. (p. 422.)

Mandamus to compel the clerk of the district court of Fergus county to issue an order of sale. Judgment for the relator; defendant appealed.

William M. Blackford, Stranahan & Stranahan, and Clayberg & Gunn, for the appellant.

⁵⁴¹ **MILBURN, J.** This is an appeal from an order granting a writ of mandate. A decree of foreclosure of liens and an order of sale under the decree were, respectively, made and issued in a number of actions which had been consolidated. The order of sale, directing several pieces of property to be sold, was placed in the hands of the sheriff, which officer sold all but one certain piece of property. The order of sale was returned by the sheriff with a certificate that all of the property was sold, excepting ⁵⁴² one piece, upon which there was a certain lien. About three years later the relator demanded of the clerk of the district court that an alias order of sale be issued out of his office, directing the sheriff to sell the certain piece of property to satisfy the lien upon it. The clerk refused, and the relator prayed for a writ of mandate to issue out of the district court, directed to the clerk, ordering him to issue the alias order of sale. The clerk demurred to the petition for the writ. The demurrer was overruled, and, upon

his failure to answer, the district court granted the writ, whereupon the clerk appealed. The specification of errors relied upon are: 1. That the court erred in overruling the defendant's demurrer to the petition for the writ; and 2. That the court erred in granting the writ of mandate.

The only question necessary for us to consider is one of practise, to wit, Is the writ of mandate the proper remedy? There has not been any appearance on the part of the respondent in this court. The question before us has not been presented in this form heretofore, but has been considered and decided by other courts. We have carefully considered the brief of the appellant, and the authorities which he has cited in support of his contention; and, besides, we have examined the decisions and opinions contra.

Had the respondent a plain, speedy, and adequate remedy at law, without resorting to a proceeding in mandamus? We think that he had. He could have gone into the court which made the decree, and, by proper motion, prayed for an order in the case upon the clerk of the court, directing him to issue the alias order of sale, without resorting to a proceeding in mandamus: *Fulton v. Hanna*, 40 Cal. 278. The case of *Garroutte v. Haley*, 104 Cal. 497, 38 Pac. 194, is one in which the court concluded that it was the duty of the clerk to issue an execution when requested by the plaintiff, and granted the application for a writ of mandamus. In this case, however, the question of whether or not mandamus would lie was not in any wise raised or discussed; it seeming to have been tacitly⁵⁴³ admitted by counsel that, if the judgment were still in force, mandamus might issue; and the case cannot be considered as being one in which the court intended to overrule its former holding that mandamus would not lie, as decided in *Fulton v. Hanna*, 40 Cal. 278.

Being of the opinion that, as above stated, there was a plain, speedy and adequate remedy by motion in the case in the proper court, mandamus was not the proper remedy. Therefore, the contention of the appellant must be, and is, sustained.

Reversed and remanded.

The Writ of Mandamus will not lie, it has been held, to compel a clerk of court to issue, nor a sheriff to levy a writ of execution, for the reason that the person entitled to the writ has a full and adequate remedy at law. It is doubtful, however, whether this is the prevailing rule: See *Wright v. Bond*, 127 N. C. 39, 80 Am. St. Rep. 781, 37 S. E. 65; *State v. Cone*, 40 Fla. 409, 25 South. 279, 74 Am. St. Rep. 150, and note.

CASES
IN THE
COURT OF ERRORS AND APPEALS
OF
NEW JERSEY.

STATE v. BONOFILIO.
[67 N. J. L. 239, 52 Atl. 712.]

HOMICIDE—Killing Attempted Robber.—A person upon whom an attempt to rob is being made is justified in killing his assailant, without attempting to use other or less radical means, or to retreat, even though such means may be resorted to with entire safety to himself, and would, manifestly, be successful. (p. 424.)

HOMICIDE—Murder—Deliberation.—The presence of a specific intent to take life is not, standing alone, conclusive that the homicidal act was done with deliberation and premeditation. (p. 426.)

HOMICIDE—Justifiable.—A man may protect himself against assault, even to the extent of taking the life of his adversary, when that act is, or reasonably appears to be, necessary to the preservation of his own life or to protect himself from serious bodily harm. (p. 427.)

C. C. Black, for the plaintiff in error.

J. E. P. Abbott, for the state.

240 GUMMERE, C. J. This writ of error brings here for review a conviction of Bonofiglio, the defendant below, of the crime of murder in the first degree, committed in the shooting to death of one Rafeole di Pasquale. The defense set up by him at the trial was that the homicide was a justifiable one for two reasons: 1. Because the killing was done by him in resisting a robbery which the deceased and his brother Constantine were attempting to commit upon him; and 2. Because it was done in self-defense. The principal ground upon which the validity of the conviction is attacked is that the trial judge erred in his instruction to the jury upon

the subject of the right of one person to kill another who is engaged in an attempt to commit a robbery. The judge having first accurately defined what constituted, in law, an attempt to commit the crime of robbery, proceeded to instruct the jury, in addition, as follows: "It is a settled principle that where such a defense—i. e., that the homicide occurred in resisting an attempt to commit a robbery—is set up as an excuse for taking the life of another, the killing having been shown, the burden of establishing it is upon the accused, who must show to the satisfaction of the jury a situation and circumstances under which such right to take life could be lawfully exercised, subject to the right of the accused to have the benefit of all reasonable doubt after the whole case is in. ²⁴¹ This means that the defendant must show, among other things, in justification, that an attempt to rob him was actually made, and such an attempt as comes within the requirements of the law as I have stated it. And if it be thus established that the prisoner, at the time that he shot the deceased, honestly, and without negligence on his part, believed that the deceased was in the process of committing a robbery of his person, in the sense that I have defined that offense, which could only be resisted by the death of his assailant, then the defendant is excused in having killed the deceased, and should be acquitted."

The trial judge, in this instruction to the jury, failed to clearly distinguish between a homicide done in resisting an attempt to rob, actually in process of execution, and one which occurs where the party killing was justified in believing that such an attempt was being made, although it is shown subsequently that the fact was otherwise. In the former case the person upon whom the attempt is being made is not required to retreat or to use other and less radical means than the killing of his assailant to render the attempt abortive, even though such means may be resorted to with entire safety to himself, and would, manifestly, be successful. His right to kill is absolute. Our statute (Crimes Act, sec. 110; Pamphlet Laws 1898, p. 825) declares that "any person who shall kill another by misadventure . . . or who shall kill any person attempting to commit arson, burglary, murder, rape, robbery or sodomy shall be guiltless and totally acquitted and discharged." Nor does this enactment inject a new feature into the law of homicide; it is merely declaratory of the common law. Hawkins, in his treatise on the Pleas of the Crown, thus states the rule of the common law upon this subject: "The killing of a wrong-

doer may be justified in many cases; as where a man kills one who assaults him in the highway to rob or murder him; or the owner of a house, or any of his servants or lodgers, etc., kills one who attempts to burn it, or to commit in it murder, robbery or other felony; or a woman kills one who attempts to ravish her": 1 Hawkins' Pleas of the Crown, c. 28, sec. 21. So, too, Hale declares that, "at common law, if ²⁴² a thief had assaulted a man to rob him, and he had killed the thief in the assault, it had been *se defendendo*; but yet he had forfeited his goods as some have thought (11 Coke Rep. 82b), though other books be to the contrary. But now, by the statute of 24 Henry VIII, chapter 5, 'if any person attempts any robbery of any person in or near any common highway, cartway, horseway or footway, or in their mansion-house, or do attempt to break any mansion-house in the night-time, and shall happen to be slain by any person or persons, etc. (though a lodger or servant), they shall, upon their trial, be acquitted and discharged in like manner as if he had been acquitted of the death of such person'": Hale's Pleas of the Crown, 487.

The necessary effect of the instruction complained of upon the jury was to leave their minds under an erroneous impression that in order to be entitled to an acquittal, the burden was upon the prisoner, not only to establish that an attempt was being made to rob him, but that he was justified in believing that such attempt could only be thwarted by the killing of his assailant. That the instruction was inaccurate has been pointed out; that the error was injurious to the defendant is apparent. For this reason the conviction must be set aside and a new trial directed.

Our attention has been called to two other inaccuracies in the charge to the jury; and, although neither of them is made the subject of an exception, we deem it advisable to refer to them, in view of the fact that the case is to be retried. It is proper, however, in this connection, to say that neither of them originated with the trial judge, but resulted from his accepting as accurate certain rules of the law of homicide contained in the published opinions of our judges.

The first of these inaccuracies appears in the instruction of the judge concerning the different degrees of criminal homicide. After stating that, by our statute, murder which is perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, is murder in the first degree, the court proceeded as follows: "I

instruct you that the distinguishing feature of the crime of murder in the first degree is the presence in the party charged ²⁴³ therewith of an intent to take life. No particular length of time need intervene between the formation of the purpose to kill and its execution. It is not necessary that the deliberation and premeditation should continue for an hour or a minute. It is enough that the design to kill be fully conceived and purposely executed. The law is that wherever there is, in committing homicide, a specific intention to take life, there is, in the language of the statute, a willful, deliberate and premeditated killing, and the offense in that case is murder in the first degree."

This portion of the charge is an excerpt from the opinion of the supreme court, delivered by Chief Justice Green, in the case of *Donnelly v. State*, 26 N. J. L. 463, 510. The doctrine enunciated in the latter part of the excerpt, however, did not originate with him, but was adopted from the opinion of the court of appeals of New York, in the case of *People v. Clark*, 7 N. Y. 385, and Wharton on Criminal Law, section 1084, both of which he cites.

When the *Donnelly* case came into this court, on a review of the judgment of the supreme court, it was said that Chief Justice Green "succinctly and accurately stated the law in the following words: 'To constitute murder in the first degree there must be an intention to take life. No particular length of time need intervene between the formation of the purpose to kill and its execution. It is not necessary that the deliberation and premeditation should continue for an hour or a minute. It is enough that the design to kill be fully conceived and purposely executed'": *Donnelly v. State*, 26 N. J. L. 616. It is to be observed that the further declaration that "wherever there is, in committing homicide, a specific intention to take life, there is a willful, deliberate and premeditated killing, and the offense is murder in the first degree," was not included in what was accepted by this court as an accurate statement of the law; and, presumably, this omission occurred advisedly, for the construction thus put upon the words "deliberate" and "premeditated" nullifies each of them, and makes every homicide murder in the first degree when the killing is willful. This is manifest, for the word "willful," although broader in ²⁴⁴ its signification than "intentional," embraces the latter in its meaning. A reading of our statute shows that the legislature, when it used the words "deliberate" and "premeditated,"

meant that something more than the bare intent to kill should exist in order to constitute murder in the first degree, for it first specified two cases of homicide in which both deliberation and premeditation are present to a marked degree, viz., by the administration of poison and by lying in wait, and then declared that murder perpetrated by any other kind of willful, deliberate and premeditated killing should be murder of the first degree. The specification of these two cases is significant; it emphasizes the meaning which the legislature intended should be given to the words "deliberate" and "premeditated."

In our opinion, notwithstanding the great respect we have for the learning and accuracy of statement of the distinguished jurist who delivered the opinion of the supreme court in the Donnelly case, the presence of a specific intent to take life is not, standing alone, conclusive that the homicidal act was done with deliberation and premeditation.

And this seems to be the present view of the New York court of appeals, notwithstanding the decision in *People v. Clark*, 7 N. Y. 385. In the case of *People v. Majone*, 91 N. Y. 211, Earl, C., says: "Under the statute [defining murder in the first degree] there must be not only an intention to kill, but there must also be a deliberate and premeditated design to kill. Such design must precede the killing by some appreciable space of time. But the time need not be long. It must be sufficient for some reflection and consideration upon the matter for the choice to kill or not to kill, and for the formation of a definite purpose to kill. And when the time is sufficient for this, it matters not how brief it is." The same statement of the law appears in the later case of *People v. Schmidt*, 168 N. Y. 568, 61 N. E. 907.

The second inaccuracy appears in the instruction to the jury on the law of self-defense, the judge stating that "before a person can avail himself of the defense that he used a weapon in defense of his life, he must satisfy the jury that that defense was necessary to protect his own life, or to protect himself ²⁴⁵ from such serious bodily harm as would give him reasonable apprehension that his life was in immediate danger." This instruction was in accordance with the rule laid down in 3 *Russ. on Crimes*, 208, cited in the opinion of Mr. Justice Depue in the case of *Brown v. State*, 62 N. J. L. 666, 708, 42 Atl. 811, in discussing the law of self-defense.

A reading of the opinion, however, will show that the rule was not accepted by the learned justice as entirely accurate,

for he follows its citation almost immediately by a reference to the opinion in the case of *State v. Wells*, 1 N. J. L. 424, 1 Am. Dec. 211, in which the rule is stated to be that "no man is justified or excusable in taking the life of another unless the necessity for so doing is apparent as the only means of avoiding his own destruction or some great injury."

The rule laid down in *Coxe* has always been accepted by our courts as an accurate statement of the right to take life in self-defense, and it will be perceived that it is considerably broader than the rule laid down in *Russell*, the latter author declaring that the bodily harm which is threatened, and which a man is justified in protecting himself against by taking the life of his assailant, must be so serious as to cause a reasonable apprehension that his own life is in immediate danger. This limitation has no existence in New Jersey. Here a man may protect himself, even to the extent of taking the life of his adversary, when that act is, or reasonably appears to be, necessary in order to preserve his own life or to protect himself from serious bodily harm.

The judgment under review should be reversed.

DIXON, J. My dissent from the judgment rendered in this case is not caused by any dissent from the doctrines stated in the opinion delivered by the chief justice. I concur in the principles there expressed.

A Homicide is Justifiable if committed in preventing the perpetration of such felonies as murder, robbery, and burglary: See the monographic note to *State v. Sumner*, 74 Am. St. Rep. 738.

Self-defense.—One may protect himself against an assault to the extent of taking life, if apparently necessary to the preservation of his own life, or save himself from great bodily harm: See the monographic note to *State v. Sumner*, 74 Am. St. Rep. 725; *Palmer v. State*, 9 Wyo. 40, 87 Am. St. Rep. 910, 59 Pac. 792.

BELLES v. KELLNER.

[67 N. J. L. 255, 51 Atl. 700.]

NEGLIGENCE—Leaving Horse Untied in Street.—It is not negligence for the driver of a quiet, gentle horse to leave him untied and otherwise unattended on the side of a public street or highway, as he is accustomed to do without accident, and with nothing of an unusual character present to alarm the horse while the driver is near by loading goods into the wagon to which the horse is hitched. (p. 431.)

S. Kalisch, for the plaintiff in error.

Lindabury, Depue & Faulks, for the defendants in error.

255 VAN SYCKEL, J. This case was tried in the Essex circuit court, where a judgment was rendered for the plaintiff. The supreme court reversed that judgment, and the judgment of the supreme court is in this court for review.

The facts of the case are very concisely stated in the opinion of Mr. Justice Fort in the supreme court, as follows: "This was an action for damages tried at the Essex circuit, brought by the plaintiff to recover for an injury alleged to have been occasioned by a horse of the defendants left standing in the public street of the city of Newark, without being in charge of any person and without being tied or otherwise secured. The plaintiff is a letter carrier, and was in the habit of passing upon his wheel three or four times daily the place where the accident happened. The defendants are retail merchants in the city of Newark, and their delivery wagons are accustomed to be backed **256** up to the curb line adjoining their property on Halsey street; the wagons are cut-under wagons, and the horses are turned so as to stand parallel with the sidewalk, and left untied while the wagons are being loaded. With these facts the plaintiff was familiar.

"It is claimed by the plaintiff that upon the day of his injury three of these delivery wagons were thus standing with the horses hitched thereto, facing to the north, parallel with the east side of Halsey street. The plaintiff states that he was riding at a speed of about six miles an hour; that he had passed two of the wagons of the defendants, and was about to pass the third, when the horse attached to it, to quote his language, 'suddenly, without any warning at all, swerved around, knocking me on the right side, and lifted me from my wheel, and threw me so I landed on the asphalt pavement on my left shoulder and head with my heels in the air.'"

The suit in the circuit court was brought to recover damages for this alleged injury. It appeared by the evidence on the part of the defendants, which was uncontradicted, that the horse was quiet and gentle, and accustomed to being left untied while the driver was a short distance from him engaged in his work; that the defendants had purchased this horse fourteen or fifteen years before, and had constantly used him in their business. During all that time it was the habit of the drivers not to tie or secure the horse in any way while leaving him to load the wagon or to deliver parcels, and during all that time he had never been known to run away or to move from the place where he was left standing.

The testimony on the part of the defendants, also, was that the driver of the horse was upon the sidewalk, about midway between the wagon and the elevator in defendants' store. That elevator was ten or fifteen feet from the wagon, and therefore the driver was distant from five to seven and a half feet from the wagon. The place where the horse was standing was free from the presence of a locomotive or music passing at the time, or any ²⁵⁷ unusual thing which could be supposed to frighten a gentle horse accustomed to be left in that condition in the street. All the horse did was to move around toward the center of the street without moving the wagon from its position against the curbstone.

To entitle the plaintiff to recover he was required to show by a preponderance of evidence that the defendants were guilty of some negligent act which was the proximate cause of the injury to the plaintiff. In reviewing this case upon the alleged error in the trial court, we must assume that the testimony on the part of the defense is true, and therefore the only question is whether the mere fact of leaving the horse untied under the conditions stated constituted actionable negligence.

The defendants' counsel requested the court to charge: "It is not negligence for the driver of a quiet, gentle horse to leave him untied and otherwise unattended on the side of a public highway, while the driver is upon the sidewalk loading goods in the wagon." The trial court refused so to charge, and to such refusal exception was taken, and error is assigned thereon.

In dealing with this request to charge, it was the duty of the trial court to consider and apply it, and to instruct the jury upon it as applicable to the facts and circumstances of the case before them, assuming that the horse was kind and gentle, accustomed to such use as before stated, and that the driver was

near him upon the sidewalk, nothing of an unusual character being present to alarm a quiet, gentle horse.

The question is whether, under these circumstances, there is anything from which an inference can be drawn that a man of ordinary prudence could have reasonably believed that injury might result from his act. With what additional care he might have been charged if the horse had been left near a steam railroad track where locomotives were passing, or in a place where fire-engines or bands of music were approaching, is not a question in this case. It has been frequently held that leaving a horse untied and unattended in the street—that is, with no one near enough to ²⁵⁸ control him by voice or otherwise, or to leave him in that condition in proximity to a steam railroad, or where the horse is not gentle—are circumstances from which negligence may be inferred: *Lynch v. Nurden*, 1 Ad. & E., N. S., 422; *Rumsey v. Nelson*, 58 Vt. 590, 3 Atl. 484; *Drake v. Mount*, 33 N. J. L. 442; *Hoboken Land etc. Co. v. Lally*, 48 N. J. L. 601, 7 Atl. 426.

The facts regarded as controlling in those cases are absent in the case before us. Here, in my judgment, there was nothing to lead a reasonably prudent man to believe that any greater care was necessary. The fact that the horse was left so that he could move a short distance before the driver could stop him did not constitute negligence; it would be difficult to tie a horse so that he would have no freedom of movement whatever.

As the court of appeals said in *Wasner v. Delaware etc. R. R. Co.*, 80 N. Y. 212, there is no absolute rule of law that requires one who has a horse in a street to tie him, or to hold him by the reins. It would doubtless be careless to leave a horse in a street wholly unattended without tying him to something; but it is common for persons doing business in streets with horses to leave them standing in their immediate presence while they attend to business, and it is not unlawful for them to do so.

In *Hayman v. Hewitt, Peake*, 170, Lord Kenyon said: "He was performing his duty while removing the goods into the house, and if every person who suffered a cart to remain in the street while he took goods out of it was obliged to employ another to look after his horse, it would be impossible for the business of the metropolis to go on."

A like view was taken in *Griggs v. Fleckenstein*, 14 Minn. 81, 100 Am. Dec. 199, where the court said: "The degree of care required of the plaintiff, or those in charge of his horse at the time of the injury, is that which would be exercised by a person

of ordinary care and prudence under like circumstances. It cannot be said that the fact of leaving the horse unhitched is in itself negligence; whether it is negligence to leave a horse unhitched must depend upon the disposition of the horse; whether he was under the observation and control of some ²⁵⁹ person all the time, and many other circumstances, and is a question to be determined by the jury from the facts in each case."

In the case under judgment there is nothing but the mere fact of leaving a gentle horse as he had been left for years under the observation and control of the driver. From that fact, under the conditions which must be conceded to exist in this case, no inference of negligence can arise. There are no circumstances to be submitted to a jury under the situation to which the request to charge applies from which a contrary inference can be drawn. The trial court should have charged: "It is not negligence for the driver of a quiet, gentle horse to leave him untied and otherwise unattended on the side of a public highway while the driver is upon the sidewalk loading goods on the wagon."

There was evidence which would have fully justified the jury in finding that the horse was quiet and gentle, and that the driver was upon the sidewalk loading goods on the wagon at the time of the alleged injury, and that the horse had been used for years in that way without an accident.

The refusal of the trial court to charge as requested left the jury free to find a verdict against the defendants, although the jury was convinced that these facts were proven.

The judgment of the supreme court reversing the judgment of the trial court should be affirmed.

MAGIE, C., dissenting. In my judgment, the trial court committed no reversible error in declining to charge the request in question, because it immediately proceeded to give instructions on the subject which were, in my judgment, unexceptional.

Leaving a Horse Unhitched in the street is not in itself negligence. Whether or not it is, is a question to be determined by the jury from all the facts. And in determining the question, testimony that the horse was trustworthy to stand unhitched in the street is admissible: *Griggs v. Fleckstein*, 14 Minn. 81, 100 Am. Dec. 199. See, also, the note to *Wasmer v. Delaware etc. R. R. Co.*, 36 Am. Rep. 612.

FRENCH v. ROBB.

[67 N. J. L. 260, 51 Atl. 509.]

IN EJECTMENT for Land Occupied by Defendant, his plea of not guilty admits a possession or claim of title, not in subordination to plaintiff. (p. 434.)

EJECTMENT—Public Streets.—The owner of the soil in a public street has such a right of possession as is capable of supporting the action of ejectment. (p. 435.)

EJECTMENT—Public Streets.—The owner of the soil in a public street cannot maintain ejectment against a public corporation occupying the street within the limits of the public right. (p. 436.)

EJECTMENT—Poles and Appliances for Lighting Street.—The owner of the soil in a public street cannot maintain ejectment against a person occupying part of the street with poles and appliances for lighting it, under a contract made by the city and authorized by statute, and if he uses such appliances wrongfully for private lighting in addition to their public use, he does not thereby lose his right to maintain them, but is liable to an action by the owner of the soil for an injunction, or for damages. (p. 436.)

EJECTMENT—Poles and Appliances in Street.—A person who has rightfully placed poles and appliances in a public street for the purpose of lighting it has no such right to the use of the street in the immediate vicinity for the purpose of supporting the poles as will support a plea of not guilty in an action of ejectment by the owner of the soil in the street. (p. 437.)

S. H. Richards, for the plaintiff in error.

J. M. E. Hildreth, for the defendant in error.

²⁶⁰ DIXON, J. The plaintiff brought an action of ejectment in the supreme court against the Delaware and Atlantic Telegraph and Telephone Company, Joseph Q. Williams, receiver of the Franklin Electric Light Company, and Thomas Robb, executor of William O. Robb, deceased, for the possession of a plot of land five feet square within the limits of Washington and Jefferson streets, in the city of Cape May. The receiver did not plead, but the telegraph company and Robb each pleaded "not guilty." At the trial in the Cape May circuit of the issues thus raised the facts appeared as ²⁶¹ follows: The plaintiff, as owner of the land abutting upon the streets, owned also the locus in quo, subject to the public easement; under an ordinance and a contract between the city of Cape May and the Franklin Electric Light Company, dated November 30, 1897, and running to July 23, 1902, the company became bound to light the streets of the city with electricity and to furnish, erect and maintain all necessary poles, wires, etc., the location and erection of the ap-

pliances in the streets being subject to the approval of the city council; accordingly, a pole was placed about the center of the locus in quo and wires strung thereon. In June, 1899, the electric company had passed into the hands of a receiver, and, the pole being then in poor condition, the receiver permitted the telegraph company to erect a new pole in its stead and to string thereon a telephone wire, the pole, however, to be the property of the electric company. Afterward, by virtue of an order of the court of chancery, the plant of the electric company was turned over by the receiver to the defendant Robb, and when this suit was brought he was carrying out the contract with the city for lighting the streets, and for that purpose he was in possession and use of the pole and some of the wires. Other wires on the pole were used by him for private lighting, and the telegraph company was using its wire for telephone purposes. On this state of facts the trial court directed a verdict for the plaintiff against the telegraph company, of which no complaint is now made; and also directed a verdict in favor of Robb for so much of the land as was occupied by the pole, and instructed the jury to find further in his favor for so much of the land around the pole as they should think reasonably necessary to be used in maintaining and taking care of the pole. To such direction and instruction the plaintiff excepted, and the jury having found Robb not guilty, the plaintiff seeks to reverse the consequent judgment.

Before considering the special aspects of the controversy, it may be helpful to advert to the real nature of an action of ejectment.

²⁶² Originally, it was designed to recover only damages for the wrongful ejection of the plaintiff from the possession of land in which he had a term of years; later, the recovery was extended to the possession of the land. To succeed, the plaintiff was required to prove a lease to himself for a term of years, made by a lessor entitled to the possession and on the land when the lease was made his entry under the lease, and ouster by the defendant. The action was usually instituted against a person not interested in the land, called the casual ejector, who gave notice of the suit to the actual possessor, and he, on application to the court, was substituted as defendant. But, as a condition of such substitution, the court required him to stipulate that at the trial he would confess the lease, entry and ouster alleged by the plaintiff, thus leaving the only fact to be proved by the plaintiff the title of his lessor. If, however, the claim of the applicant was

such as would not warrant him in ousting the plaintiff, and yet would justify his own possession, as if he claimed only as joint tenant with the lessor, then he stipulated to confess ouster of the plaintiff only in case the plaintiff should prove actual ouster of the lessor. If, at the trial, the plaintiff showed such title in his lessor as made the confessed ouster wrongful, or if, when ouster was only conditionally confessed, he showed an actual ouster of the lessor, or a title against which any possession by the defendant was wrongful, then he recovered damages and possession; otherwise, his suit failed. Thus the technical issue in the case was always whether the defendant had wrongfully ousted the plaintiff.

Under our statute the technical issue remains the same, although presented by a different procedure. The real claimant, the old lessor, is the plaintiff, and his complaint is that the defendant wrongfully deprives him of possession. The defendant is the real counter-claimant, and if he means to defend absolutely he pleads not guilty, and by that plea admits a possession or claim of title which should exclude or oust the plaintiff; while if he means to defend only for a possession or claim of title which does not exclude the plaintiff—e. g., as joint tenant with him—he must give notice with ²⁶³ his plea that he admits the right of the plaintiff to an undivided share of the land, and denies actual ouster: *Combs v. Brown*, 29 N. J. L. 36. Then if, at the trial, on the simple plea, the plaintiff shows a title against which the defendant's exclusive possession or claim would be wrongful, or, on the plea and notice, he shows an actual ouster wrongful in view of his admitted right, or a greater right which makes the defendant's possession a wrongful ouster, the plaintiff will be entitled to judgment; otherwise not.

In the present case, the locus in quo being within the limits of public streets, a preliminary question arises, whether the plaintiff, as owner of the soil, has such a right of possession as is capable of supporting the action of ejectment. In *Cincinnati v. White*, 6 Pet. 431, Mr. Justice Thompson urged, with much force, the negative of this query; but in New Jersey the affirmative must be regarded as settled by the decision of this court, reversing the judgment of the supreme court, in *Wright v. Carter*, 27 N. J. L. 76. See *State v. Laverack*, 34 N. J. L. 207; *Burnet v. Crane*, 56 N. J. L. 288, 44 Am. St. Rep. 395, 28 Atl. 591.

The plea of the defendant Robb is simply "not guilty"—i. e., that he has a possession or claim which rightly excludes the

owner of the soil. It is established, by express decision, in this state that the public corporation, which represents the public right to the use of streets, may maintain ejectment against any person, even the owner of the soil, who occupies a street in a manner inconsistent with the public use: *Hoboken Land etc. Co. v. Hoboken*, 36 N. J. L. 540. From this it logically follows that the owner of the soil cannot maintain ejectment against such public corporation occupying the street within the limits of the public right. This was so adjudged by the federal supreme court, in *Cincinnati v. White*, 6 Pet. 431, and *Barclay v. Howell*, 6 Pet. 498, cases which are cited, with evident approval, by Mr. Justice Depue, in *Hoboken Land etc. Co. v. Hoboken*, 36 N. J. L. 540. The same exemption from successful attack must be conceded to the agencies through which the public corporation exercises its rights, whether those agencies be designated by ²⁰⁴ employment or by contract, for its rights would be fruitless if they could not be used to protect the individuals through whom they may be lawfully exercised and without whose intervention the corporation could not enjoy them.

One of the rights belonging to the corporation is to occupy the streets with poles and wires for public lighting. This right was expressly conferred by the act of May 22, 1894 (Pamphlet Laws, p. 477), according to which it may be exercised either directly by the city itself or indirectly through parties contracting with the city, and is not conditioned upon consent of the owner of the soil: *Meyers v. Hudson County Electric Co.*, 63 N. J. L. 573. 44 Atl. 713. When the contract under which Robb claims was made, this statute was in complete force, and although "An act concerning townships," approved March 24, 1899 (Pamphlet Laws, pp. 372, 476), attempts to repeal it, yet, as the title of this act limits its operation to townships, the statute still remains effective in cities.

So far, therefore, as Robb occupied the streets with poles and other appliances for public lighting, and thereby excluded the plaintiff, the ouster was not tortious, and a verdict of not guilty was properly directed. But the defendant pleaded not guilty for the entire locus in quo, and we must consider whether, outside of the space occupied by these appliances for public lighting, he has shown a right to the exclusive possession which his plea sets up.

No color of right is shown for maintaining apparatus for private lighting, and as to the wire strung for that purpose the defendant was clearly guilty. The plaintiff urges that the

wrongful use of the pole to sustain this wire should be visited with the forfeiture of the entire right; but we find no ground for such contention. Such a judgment would inflict a loss upon the public for the private fault of one of its instruments. The plaintiff does not need such rigor for his protection. So far as the appliances are not used for public purposes, this suit will result in abating them; so far as those required for public purposes have been wrongfully used, the plaintiff can be compensated by an action on the case for damages, and equity will restrain their misuse in the future.

265 There remains for consideration the defendant's claim to the land around the pole and appliances, found by the jury to be necessary for his use in maintaining them.

The right to use that land for such a purpose did not justify the exclusive possession admitted by the plea. It was only the right enjoyed by every member of the community while in actual use of the street. It was discontinuous, and lacked the permanent and exclusive characteristics which are necessary to support or defend an action of ejectment. As a personal right it was, in essence, like a private right of way, which cannot constitute a defense in an action of ejectment brought by the owner of the soil: *Burnet v. Crane*, 56 N. J. L. 285, 44 Am. St. Rep. 395, 28 Atl. 591.

The proper conduct of the trial at the circuit required a verdict that the defendant Robb was not guilty as to that part of the locus in quo which was actually occupied by the pole and other appliances used for public lighting, and that as to the residue he was guilty.

The present judgment should be reversed and a venire de novo awarded.

The Owner of the Fee in a Public Street or highway may maintain trespass against any person committing a wrong therein: See the note to Mayhew v. Norton, 28 Am. Dec. 305; Huffman v. State, 21 Ind. App. 449, 69 Am. St. Rep. 368, 52 N. E. 713. And in a proper case he may bring ejectment against those encroaching thereon: See the note to Mayhew v. Norton, 28 Am. Dec. 304, 305; Smeberg v. Cunningham, 96 Mich. 378, 35 Am. St. Rep. 613, 56 N. W. 73; as where a telegraph corporation constructs and maintains its line upon the highway without his consent and without compensating him: Postal Tel. Cable Co. v. Eaton, 170 Ill. 5, 13, 62 Am. St. Rep. 390, 49 N. E. 365.

CAMPBELL v. MANUFACTURER'S NATIONAL BANK.

[67 N. J. L. 301, 51 Atl. 497.]

AGENCY—Bank Cashier.—The same rules of agency apply to bank cashiers as to other persons occupying fiduciary relations. (p. 439.)

AGENCY.—No Person can Legally Act as an agent in a transaction in which he has an interest or to which he is a party on the side opposite to his principal. (pp. 439, 440.)

AGENCY—Bank Cashiers.—A person cannot deal with a bank cashier as an individual in securing a draft, and then claim, after the draft is delivered, that it has become the transaction of the bank. (p. 440.)

AGENCY.—To Make Acts of Bank Cashiers Valid as against their banks, the transaction must be a bank transaction made by the cashier, within his express or implied authority in the conduct of the business of the bank, and so long as a person deals with the cashier in a matter wherein, as between himself and the cashier, he is dealing with, or has a right to believe he is dealing with, the bank, the transaction is obligatory upon the latter. (p. 440.)

BANKS AND BANKING—Power of Bank Cashiers—Presumptions.—While a bank cashier is presumed to have all the authority he exercises in dealing with executive functions legally within the powers of the bank, or which are usually or customarily done, or held out to be done by such officer, the test of the transaction is whether it is with the bank and its business, or with the cashier personally and in his business. As to the former, all presumptions are in favor of its validity as against the bank. In the latter no such presumptions are indulged. (p. 440.)

BANKS AND BANKING—Transactions with Cashier.—If a transaction between an individual and a bank cashier is known to the individual to be a personal transaction, and not one for the bank, the burden of proof is upon him to establish that the act of the cashier thus done for his individual benefit was authorized or ratified by the bank. (p. 440.)

BANKS AND BANKING—Fraudulent Acts of Cashier—Ratification and Estoppel.—If a bank gives its cashier authority to draw drafts for his own account on its funds, or ratifies his acts in known transactions which he openly conducts, honestly or dishonestly, it is estopped to say that a similar transaction, secretly and by concealment conducted by him, does not bind it, but such estoppel and ratification does not arise from concealed dishonest transactions by the cashier unknown to the bank. (p. 442.)

BANKS AND BANKING—Fraudulent Acts of Cashier—Ratification.—Failure on the part of the officers and directors of a bank to detect the concealed and fraudulent acts of its cashier, which an inspection of the records and books of the bank with ordinary care would not have disclosed, will not work a ratification of such dishonest acts. (p. 444.)

J. Coult, F. Child, and J. A. Miller, for the plaintiff in error.

R. V. Lindabury and S. Depue, for the defendant in error.

302 FORT, J. This is an action by the receiver of the Middlesex County Bank to recover back money paid to the plaintiff

in error by George M. Valentine, who was, at the time of the payment, cashier of said bank. The payment was made by Valentine in satisfaction of his individual debt. The method of payment was by a draft of the Middlesex County Bank, drawn on the National Park Bank of New York, its correspondent, and signed "George M. Valentine, Cashier." The draft thus issued was drawn to the order of John A. Miller, attorney, and delivered to him for the plaintiff in error.

The transaction out of which the indebtedness of Valentine to the plaintiff in error, the Manufacturers' National Bank, arose was the discounting of a note, made by a firm of which Valentine was a member, and indorsed by Valentine individually and others. This note, thus discounted, fell due and was protested, and afterward judgment was obtained thereon against the makers thereof and Valentine individually. The Middlesex County Bank had no interest, directly or indirectly, in the note or its proceeds.

All these facts were known to the plaintiff in error, both before and after the judgment. The judgment was entered March 4, 1899. Mr. Miller, the attorney of the plaintiff in error, after several attempts, found Valentine at the bank, in Perth, Amboy, on March 13, 1899. Payment of the judgment was demanded, and, after some talk, Valentine, in the presence of Miller, took the draft-book of the Middlesex County Bank, ³⁰³ containing blank drafts of that bank on the National Park Bank of New York, and filled out a draft of the Middlesex County Bank upon the National Park Bank of New York, for the sum of seven thousand five hundred dollars, to the order of J. A. Miller, attorney as aforesaid, and signed it "George M. Valentine, Cashier," and handed this draft to Miller. The draft thus delivered to Miller was not, and did not pretend to be, anything other than the draft of the Middlesex County Bank, made by its cashier, in his official capacity, against the funds of the Middlesex County Bank deposited in the National Park Bank of New York, and was intended by Valentine, and known by Miller, to be issued for the payment of the debt of George M. Valentine as an individual. With all of these facts the plaintiff in error, by its officers and its attorney, was familiar.

There is no reason which is founded on principle that can be given for not applying the same rule of agency to a cashier as to other persons occupying fiduciary relations. No person can act as an agent in a transaction in which he has an interest, or to which he is a party, on the side opposite to his principal.

This must be so where the person dealing with the agent has knowledge of the facts.

A person cannot deal with a cashier of a bank as an individual in securing a draft, and claim after the draft is delivered it has become the transaction of the bank. To make the acts of the cashier valid, the transaction in which the draft is delivered must be a bank transaction, made by the cashier, within his express or implied authority, in the conduct of the business of the bank. So long as a person deals with the cashier in a matter wherein, as between himself and the cashier, he is dealing with, or has a right to believe he is dealing with, the bank, the transaction is obligatory upon the bank.

The cashier is presumed to have all the authority he exercises in dealing with executive functions legally within the powers of the bank itself, or which are usually or customarily done, or held out to be done, by such an officer. But the test of the transaction is whether it is with the ³⁰⁴ bank and its business, or with the cashier personally and in his business: *Clafin v. Farmers' Bank*, 25 N. Y. 293; *Moore v. Citizens' Nat. Bank*, 111 U. S. 156. As to the former, all presumptions are in favor of its regularity and binding force. In the latter, no such presumption arises; in fact, upon proof that it was known to the claimant to be an individual transaction, and not one for the bank, the burden is cast upon the claimant to establish by proof that the act of the cashier thus done, for his own individual benefit, was authorized or ratified.

These are fundamental principles applicable to principal and agent in every transaction arising out of that relation: *Bank of New York v. American Dock etc. Co.*, 143 N. Y. 559, 564, 38 N. E. 713; *Manhattan Life Ins. Co. v. Forty-second etc. Ferry Co.*, 139 N. Y. 146, 151, 34 N. E. 776; *Shaw v. Spencer*, 100 Mass. 382, 390, 394, 97 Am. Dec. 107, 1 Am. Rep. 115; *Petrie v. Clark*, 11 Serg. & R. 377, 14 Am. Dec. 636 (Chief Justice Gibson); *Rochester etc. Road Co. v. Paviour*, 164 N. Y. 281, 286, 58 N. E. 114; *Huffcut on Agency*, 2d ed., 110.

Little contention was made in this case, even by the counsel of the plaintiff in error, against the rule above stated, although some effort was made to distinguish between the rule applicable to principal and agent, as applied to a cashier, as contradistinguished from other agency relations, but we are unable to accept such a theory or to hold the rule to be any broader in the case of a cashier than as above declared.

Strong contention was made by the plaintiff in error for the right to retain the fund received for Valentine's individual debt from the proceeds of the draft of the Middlesex County Bank, upon the grounds: 1. That Valentine was authorized to issue such drafts; and 2. That if he were not so authorized, his act in this case would be deemed ratified, through the knowledge of the bank's officers, obtainable from the draft itself or the records of the bank, from which they actually knew, or were chargeable, in the exercise of ordinary care, with knowing the transaction.

The case is utterly devoid of proof that Valentine was ever authorized by anyone to draw drafts of this character for his individual account against the funds of the bank with its ³⁰⁵ New York correspondent. It does appear that he had overdrawn his account and borrowed money on questionable securities, but those transactions are stated, by the letters to the banking department, to be ones with which the directors were familiar, and about which the directors knew, and for which they held securities, and in which the directors only differed with the banking department as to the sufficiency of the security they had required Valentine to pledge for those loans.

There is no proof that those loans were not made in the usual course; nor that the directors authorized or acquiesced in the use of the bank's funds by Valentine before or without their knowledge; nor that Valentine, in any of the transactions out of which these obligations arose, had ever dealt with any person to create his indebtedness to the bank before the bank directors knew of it and had authorized his use of the funds; nor is there anything to show, in any of those letters to the banking department by the president of the bank, or from that department to the bank, that the directors knew he was using the funds of the bank, without their knowledge or consent, in his individual transactions, or that he had paid a single individual debt before they were advised of it and had received security from him for the money which he proposed to use to pay it. It would have been an entirely different situation if he had been in the habit of drawing similar drafts against the bank's funds for his individual purposes before consulting the president or the directors, and they had known of or subsequently approved such acts. That would have made a case within the principle ruled in *Goshen Bank v. State*, hereafter considered, but that is not this case. Whatever acts are proven to have been done by Valentine, without the approval of the president or directors first obtained, were

admittedly concealed transactions—not open ones—fraudulent acts. It is not pretended that a single one of the thirteen drafts alleged to be fraudulent, out of over sixteen thousand honest ones, was actually authorized or ratified by the president or the directors; nor is it pretended ³⁰⁶ that a single open transaction of that kind was known to or ratified by them.

It is not concealed dishonest transactions which made a ratification, but open ones, of a character similar to the alleged dishonest ones: *Gale v. Chase Nat. Bank*, 104 Fed. 214. If a bank gives its cashier authority to draw drafts for his own account on its funds, or ratifies his acts in known transactions which he openly conducts, honestly or dishonestly, it will not be permitted to say that a similar transaction which he secretly and by concealment conducts does not bind it. The distinction is just here. This was the basis of the decision of the New York court of appeals, in *Goshen Nat. Bank v. State*, 141 N. Y. 379, 36 N. E. 316, upon which the plaintiff in error so strenuously relies. The opinion in that case cites the facts very meagerly. Through the courtesy of the present chief judge of that court I have had before me all the proofs, findings and exhibits upon which that case was decided, and an examination of the record fully sustains Judge Peckham in saying that the cashier there "had the right to draw a draft on the corresponding bank of the claimant for himself upon the same terms that he had to draw a draft for a stranger." Henry Bacon, the president, testified (at page 9 of the record) that "he [the cashier] had a right to draw a draft on the Importers' and Traders' National Bank for himself upon the same terms that he would draw for a stranger." George Grier, the assistant cashier of the bank, testified that he was well acquainted with the cashier's methods of drawing drafts in all his transactions as county treasurer, for more than a year prior to the drawing of the fraudulent draft in controversy, and that during that period Murray "was accustomed to draw checks as county treasurer against the funds in his hands as such treasurer, on deposit in the Goshen National Bank, payable to the Goshen National Bank, in various amounts, and then, as cashier of said Goshen National Bank, to draw drafts for a similar amount on the Importers' and Traders' National Bank of the City of New York, against the funds of the Goshen National Bank on deposit with said ³⁰⁷ Importers' and Traders' National Bank, placing said drafts to his credit in said Importers' and Traders' National Bank as county treasurer."

There was no dispute, under the facts in that case, that practically all the time that Murray, the cashier, was county treasurer he had used the bank's drafts for his own purposes, as such treasurer, to transfer funds to New York, with the knowledge of the president, assistant cashier and directors. He was also permitted to draw such drafts to himself or a stranger, in county treasurer matters, with the same freedom that he would issue such a draft to any customer of the bank. They had allowed him to treat himself, in his official relation of county treasurer, in the matters of issuing cashier's checks or drafts, for county treasurer's account, as he was permitted to do for any other depositor or other person dealing with the bank in the ordinary course of business.

That case was, upon its facts, in exact conformity with the principle here sustained, and, upon all the cases, under the facts proven, was rightly decided. Judge Peckham himself expressly distinguishes the Goshen Bank case from cases like the one before us in *Bank of New York v. American Dock etc. Co.*, 143 N. Y. 559, 564, 38 N. E. 713. Nor will the facts in this case justify a finding of constructive notice to the directors of the Middlesex County Bank, arising from a failure to know what they would have known had they exercised ordinary care, as to the draft issued by Valentine to Miller. If the draft had been drawn to Valentine's own order, it would have been discoverable upon inspection, and some question might then have arisen. This draft was drawn to "John A. Miller, Attorney," and was regularly entered on the stub of the draft-book, and would appear perfectly regular in the account current when returned by the National Park Bank, with the vouchers, at the end of the month. A bank may issue its draft to anyone who pays for it. Is it to be said that a bank will be held to ratify a draft fraudulently issued by its cashier, though regular on its face, because the other officers of the bank do not trace through the books of the bank to see to what account it is ~~so~~ charged? Upon the face of the draft no one but Miller, the attorney, and the officers of the plaintiff in error, besides Valentine, could have known the draft was for his individual debt.

That which is discernible by inspection, upon the face of a draft or record, and which needs no investigation to show it to be out of the ordinary, and therefore speaks for itself, will, no doubt, raise an implied or constructive ratification, if seen by officers or directors. And failure to exercise ordinary care in checking off vouchers or inspecting records by bank officers

will, no doubt, also raise such a ratification, if it appears that, if they had so examined the same, a simple inspection thereof would have shown the facts.

They are undoubtedly chargeable with the things they know, or would have known by the exercise of ordinary care, and are estopped from denying their responsibility thereon unless repudiated within a reasonable time after such knowledge or imputed knowledge. But the facts in this case, as to the draft in question, do not bring it within this rule.

All the points here determined are fully discussed by the opinion in *Lamson v. Beard*, decided in the United States circuit court of appeals, and the same conclusion reached as here: *Lamson v. Beard*, 94 Fed. 30.

Under all the cases and upon principle, under the facts in evidence, the trial court was right in directing a verdict for the plaintiff, and the judgment of the supreme court entered on that verdict is affirmed.

GARRISON, J., concurring. I have not been able to see how one agent of a bank could confer general authority upon another agent of the bank to transfer the property or credits of the bank to the latter's individual creditors in payment of his personal debts. If express authority to this effect had been shown, it would not, in my judgment, have altered the case. Hence, of course, I do not consider that it was error to refuse to permit the jury to determine whether or not there was implied authority to the same end. For this reason I shall vote to affirm the judgment of the trial court. I concur in the view of Mr. Justice Fort that there was no proof of ratification of this particular transaction.

Mr. Justice Dixon Dissented on the ground that the evidence produced at the trial made it a question necessarily to be submitted to the jury whether or not the act of the cashier was within the authority conferred upon him by the board of directors of the bank.

The Cashier of a Bank is only its agent, and his conduct is governed by the general law of agency. Hence the bank is bound so long as he keeps within the scope of his authority, but is not answerable if he acts beyond his authority or in his individual capacity: See the monographic note to Corser v. Paul, 77 Am. Dec. 759-763; Simmons Hardware Co. v. Bank, 41 S. C. 177, 44 Am. St. Rep. 700, 19 S. E. 502; L'Herbette v. Pittsfield Nat. Bank, 162 Mass. 137, 44 Am. St. Rep. 354, 38 N. E. 368; Oakland County Sav. Bank v. State Bank, 113 Mich. 284, 67 Am. St. Rep. 463, 71 N. W. 453; Allen v. First Nat. Bank, 127 Pa. St. 51, 14 Am. St. Rep. 829, 17 Atl. 886; Davenport v. Stone, 104 Mich. 521, 53 Am. St. Rep. 467, 62 N. W. 722.

FIVEY v. PENNSYLVANIA RAILROAD COMPANY.

[67 N. J. L. 627, 52 Atl. 472.]

CONTRACTS—Presumption that Signer Read.—Affixing a signature to a contract creates a conclusive presumption, except as against fraud, that the signer read, understood and assented to its terms. (p. 448.)

FRAUD—Evidence.—To establish a misrepresentation that will invalidate a contract it must appear that the representation was not only false, but made with intent to deceive, and that the person seeking relief acted upon and was misled by it. (p. 449.)

FRAUD is not Presumed, but must be clearly and distinctly proved by the person who asserts it. (p. 450.)

FRAUD—Burden of Proof.—A person who claims that his signature to a written contract was procured by fraud has the burden of proof to clearly establish such fraud, as innocence, and not fraud, is always presumed. (p. 450.)

APPELLATE PRACTICE.—Assignments of Error framed in entire disregard of the rules of pleading and of practise in the appellate court cannot be considered on appeal. (p. 451.)

T. P. Wickes, for the plaintiff in error.

J. B. Vredenburg, for the defendant in error.

⁶²⁸ HENDRICKSON, J. The plaintiff brought suit against the defendant company to recover damages for an injury resulting from the alleged negligence of the company. The defense was a denial of the negligence and a release. The case was tried at the Hudson circuit, and resulted in a direction of the verdict in favor of the defendant. Exception was taken to this action of the trial judge, and error has been duly assigned thereon.

The plaintiff's injury happened on March 14, 1899, in the Harsimus freight yard of the defendant at Jersey City, while in its employ as a brakeman. A freight train of open cars, loaded with lumber, was engaged in drilling, cutting off a car at a time and, by means of switches, locating them upon the tracks at the various piers of the company on the river. The plaintiff was in charge of one of these cars just "cut off" from the train, and was standing at its easterly end, regulating its movements by means of a hand-brake, which consisted of a wheel on top of an upright rod, with a "ratchet" at the foot, into which a "dog" would fall at each rotary movement of the brake and hold it in place until moved again. ⁶²⁹ While the car was moving eastwardly toward the dock a switch was misplaced, whereby the car was being carried upon the wrong track

and was about to collide with an engine standing there. The plaintiff's story is that he at once applied the brake, but ineffectually, because it was out of order, and, from the force of the impact of the collision, the lumber in the car was thrown against him, causing his injuries. He says the defect in the brake was that the rod was bent, causing the "dog" to fall below the ratchet, leaving him to hold the brake in place by main strength. It will be perceived that the charge of negligence involved, as questions of fact, the alleged defect in the brake, and the failure of the company's agents to discover it by the exercise of reasonable care, and whether the defect had existed for such a length of time as to afford the company a reasonable opportunity to discover it.

The plaintiff's evidence upon these questions was traversed by that of the defendant, but since the judge's direction was confined to the proof upon the subject of the alleged release, we will not consider, for the present at least, the question of the failure to prove negligence, which was one of the grounds of the motion to direct the verdict. In addition to other defenses, the defendant pleaded and offered proof in support of the following facts, to wit: That the plaintiff, as an employé of the defendant, some time prior to the accident, had applied for membership in the relief fund managed by the defendant company, as alleged, for the protection and benefit of such of its employés as might desire to avail themselves of its provisions; that one of the agreements in the application is that if the applicant should be accepted as a member, the acceptance of benefits from the relief fund for injury or death should operate as a release of all claims for damages against the company arising from such injury or death, and that the plaintiff or his legal representatives would execute such further instruments as might be necessary to formally evidence such acquittance; that the application was duly approved by the defendant, and the plaintiff thereupon accepted and admitted as a member in the relief fund; that after the ⁶³⁰ date of the alleged injury the plaintiff accepted from the relief fund, for his said injuries, certain payments, made from time to time, aggregating the sum of eighty-two dollars, and gave receipts and acquittances for the same, which operated as a release of all the claims for damages alleged in the suit.

The plaintiff did not deny the facts thus alleged, but, by his pleading and proof, sought to avoid the effect of such alleged release, on the ground that the agreement in question

was unknown, at the time of the execution of the application for membership, and that it was, in fact, obtained from him by fraud and deceit. The replication setting up the fraud by general averment was sustained on demurrer: *Fivey v. Pennsylvania R. R. Co.*, 66 N. J. L. 23, 48 Atl. 553. And, under the point we are now considering, the question is, Was there sufficient proof of the alleged fraud and deceit before the court to send the case to the jury? In such an inquiry we must take that view of the evidence which is most favorable to the plaintiff.

The case shows that the execution of the application for membership took place in the presence of the medical examiner of the defendant, in the relief department at Jersey City, to whom the plaintiff had presented himself for the required physical examination. It occurred at the close of the examination, the results of which are found embodied in the examiner's certificate attached to and forming part of the application, which was partly printed and partly written. The plaintiff gives his version of the transaction, from which we are asked to gather the elements of the fraud alleged, as follows:

"Q. At the time when it was handed to you for execution—that day when you went up to the doctor's office—confine your evidence to what was said to you when the paper was handed to you for execution. A. He simply shoved it in front of me and told me to sign my name; that it was all a matter of form; that is all.

"Q. What was said to you at this time by Dr. Simpson in reference to this document just before you signed it? A. Nothing whatever.

631 "Q. (The Court.) You can read and write? A. Yes; there is plenty of words I didn't understand.

"Q. (The Court.) You can read? A. A little, not much.

"Q. You can read print? A. With the exception of some words.

"Q. What, if anything, did Dr. Simpson say to you at this particular time touching the nature of the paper which he asked you to sign? A. He said it was a benevolent association belonging to the employes of the railroad, and there was so much deducted from their wages every month to contribute toward the support of this fund, according to what class you would go in.

"Q. Did he say anything to you about the railroad company's being a part of this fund? A. Nothing whatever.

"Q. Did he say anything to you at this time about your releasing the railroad company in case of any accident to you? A. No, sir.

"Q. Did he request you at any time to sign the paper? A. When he was all through he shoved it in front of me, and he said, 'Sign it'; I commenced to read it; he said it was all a matter of form—it was immaterial.

"Q. How did you commence to read it? A. I commenced to look at the print out of curiosity to see what it contained, if I could possibly make it out.

"Q. Did you read any part of what is written in that left-hand page before he told you that it was a matter of form or immaterial? A. He would not give me time to read it.

"Q. Did you read it? A. No, I did not.

"Q. Did you read at that time anything on either side of the paper? A. No, sir."

The witness further testified that the doctor did not, at or prior to the time of signing, read to him anything from the ⁶³³ paper, nor from any book like the book of the regulations of the relief fund offered in evidence by the defendant. Is there to be found in this testimony such elements of fraud or deceit as, under the law, are sufficient to discharge a person who can read and write from the binding force of a contract in writing, otherwise valid, which has been duly executed by him? The fact that the plaintiff did not choose to read the paper, or the material parts of it, before signing, or did not know its contents at the time, cannot, in the absence of actual fraud, relieve him from its obligations.

This doctrine arises from the well-settled principle that affixing a signature to a contract creates a conclusive presumption, except as against fraud, that the signer read, understood and assented to its terms.

In *Lewis v. Great Western R. R. Co.*, 5 Hurl. & N. 967, where a suit was brought to recover for a sack of clothes, which had been shipped, but not delivered, the defense was that the package was not called for within the time required by the conditions to a receiving note signed by the shipper. The plaintiff testified: "I delivered in a paper, specifying what the things were; I signed it; I did not read the paper; a person told me to sign it; he did not call my attention to the conditions or read them; I think I must have seen the word 'conditions.'" The case was heard before Chief Baron Pollock and his associates, and it was held that there was nothing to rebut

the presumption arising from the signature of the paper that the signer understood that the contract was subject to the conditions.

In *Rice v. Dwight Mfg. Co.*, 2 Cush. 80, the principle found expression in these words: "A party who enters into a contract in writing, without any fraud or imposition being practised upon him, is conclusively presumed to understand and assent to its terms and legal effect."

Other authorities in point are *In re Greenfield's Estate*, 14 Pa. St. 491; *Van Deventer v. Van Deventer*, 46 N. J. L. 460; *Upton v. Tribilcock*, 91 U. S. 45; *Vickers v. Chicago etc. R. R. Co.*, 71 Fed. 139; *Wallace* ⁶³³ *v. Chicago R. R. Co.*, 67 Iowa, 547, 25 N. W. 772; *Chu Pawn v. Irwin*, 82 Hun, 607, 31 N. Y. Supp. 724.

To return, then, to the question of actual fraud, the allegation is that fraud was practised upon the plaintiff, in procuring his signature, by fraudulent representations as to the nature of the paper signed and as to the party with whom plaintiff was contracting.

This averment is based upon the plaintiff's version of what the medical examiner said as to the nature of the paper about to be signed. This has already been recited. It is not a statement as to the contents of the paper, but rather a remark as to its nature. Whether the remark was called out by a question does not appear. The statement is condemned as false and misleading, not because it defines the association as a benevolent one belonging to the employés of the railroad, for that was a fairly accurate description of it. The case shows that the relief fund is for the exclusive benefit of the employés who are members of it and contribute to its support, and who become disabled by sickness or accident, and of the relatives or other beneficiaries in the event of death. It is contended that the statement, though true in fact, became fraudulent and misleading in not stating that the railroad itself was a party to the contract and interested in the association. But the balance of the statement, to the effect that there was so much deducted from the wages of the employés every month to contribute toward the support of this fund, according to the class they should go in, would seem to indicate that the company was connected with it. But to establish a misrepresentation that will invalidate a contract, it must appear that the representations were not only false, but made with intent to deceive, and that the party seeking relief acted upon and was misled

by them. It is difficult to see wherein the statement of the medical examiner was false or fraudulent within the rule here stated. Especially must this be so when we look at the other circumstances proved. It must have been in the minds of the parties that the plaintiff would be associated with fellow-employés who were members ⁶³⁴ of the relief fund, who would be likely to be acquainted with the rules and regulations of the association, and who would readily give such information as plaintiff desired. It also appeared that, very shortly after signing the application, the plaintiff was furnished, according to the regular practise, with a small book, convenient for the pocket, in which was pasted a copy of the certificate of membership, and which contained all the regulations of the relief department and an exact copy of the form of application. This book contained upon the outside cover, upon the fly-leaf and as headlines upon several pages, the words in large print, "The Pennsylvania Railroad Voluntary Relief Department." The evidence showed, and the fact was not denied by the plaintiff, that he received the book and certificate over two months before the accident. But in this case it is contended that there are other circumstances giving color to this charge of fraud. The fact is pointed to that after this statement the medical examiner "shoved the paper" in front of the plaintiff and "told him to sign" his name; that plaintiff "commenced to read it," and "he was told by the doctor it was all a matter of form—it was immaterial."

In the case of *Van Deventer v. Van Deventer*, 46 N. J. L. 460, the objection was that the party who had executed the obligation did not know its nature, and was told by the plaintiff that the papers were of no account and only a formal matter. But since it was not shown that the obligor was defrauded by any representation that the documents were of a different character or import from that plainly appearing on their face, and it appearing that the obligor could read and had liberty to examine the papers, the supreme court held the objection insufficient to avoid the obligation.

In considering this question it should also be observed that a charge of fraud must be clearly and distinctly proved by the party who asserts it. The presumption is in favor of innocence, and fraud is not to be assumed on doubtful evidence: *Kerr on Fraud and Mistake*, 384.

The point has been pressed also that because the application ⁶³⁵ was a long one and contained on the back, in small type,

the rules and regulations of the association, this fact should be regarded as a badge of fraud. But, in fairness, it must be said that the application itself, in which was contained the agreement of release upon which the defense is based, and also the book of regulations referred to, were printed in plain, legible type. It was further intimated, rather than argued, that the defense should be regarded with disfavor on the ground that the contract is a hard one from the plaintiff's standpoint. But we see nothing in the case to justify a departure from the ordinary rules applying to the enforcement of contracts. The validity of the agreement in question was passed upon by this court, after very careful consideration, in *Beck v. Pennsylvania R. R. Co.*, 63 N. J. L. 232, 76 Am. St. Rep. 211, 43 Atl. 908, and it was there held that the contract was not against public policy, nor lacking in mutuality or consideration, nor ultra vires.

The case of *O'Neil v. Lake Superior Iron Co.*, 63 Mich. 690, 30 N. W. 688, was cited for the plaintiff as authority for the proposition that in a case like this the court should be astute to discover a fraud upon the employé in such an action, but it is not in point, because it was shown that the employé could not read, and had no knowledge of the terms or conditions of the printed matter.

The other cases cited are not out of harmony with the legal rules herein expressed. There was in the present case an entire failure to show the indicia of actual fraud; hence the determination of this point was for the court, and the result follows that the learned trial judge was justified in directing the verdict for the defendant. There were a number of exceptions taken and sealed to the admission and rejection of evidence by the trial judge, but they are not properly before us, and cannot be considered.

The questions overruled, nine or more in number, are all included in a single assignment of error. And the questions rejected, twelve or more in number, are likewise embraced in a single assignment. The objection raised by the defendant to these assignments is that they are multifarious. ⁶³⁶ These assignments are framed in entire disregard of the rules of pleading and of the practise of this court, and cannot for that reason be considered: *Associates v. Davison*, 29 N. J. L. 415, 418; 2 Ency. of Pl. & Pr. 938, note 5; 3 American Digest, Cent. ed., 3028.

It may be stated, however, that the only exceptions under these last assignments pressed upon our consideration at the

argument were those taken to the overruling of questions designed to elicit from the plaintiff an answer to the questions whether, at any time from the date of his application until the occasion of his signing the last receipt for benefits, he knew he would be releasing his cause of action against the railroad company by so doing. It is quite apparent, from what has already been said, that, in the absence of proof of fraud, the evidence to be thus elicited was entirely immaterial, and was properly overruled.

We find no error in the record, and the result is that the judgment below must be affirmed.

One Cannot Release Himself from Liability on a contract upon the ground that he did not read it before signing, in the absence of fraud: *Crim v. Crim*, 162 Mo. 544, 85 Am. St. Rep. 521, 63 S. W. 489. It is otherwise, however, if the signature is procured by misrepresentation, especially if the obligor is an illiterate person: See *Green v. Wilkie*, 98 Iowa, 74, 60 Am. St. Rep. 184, 66 N. W. 1046; *Willard v. Nelson*, 35 Neb. 651, 37 Am. St. Rep. 455, 53 N. W. 572. Yet the general rule as to fraud is, that it cannot be presumed, but must be proved clearly and distinctly by the party alleging it: *Snayberger v. Fahl*, 195 Pa. St. 336, 78 Am. St. Rep. 818, 45 Atl. 1065; *Kahn v. Traders' Ins. Co.*, 4 Wyo. 419, 62 Am. St. Rep. 47, 34 Pac. 1095; *Bank of Little Rock v. Frank*, 63 Ark. 16, 58 Am. St. Rep. 65, 37 S. W. 400. But he is not required to establish it beyond any doubt: *Baltimore etc. Ry. Co. v. Scholes*, 14 Ind. App. 524, 56 Am. St. Rep. 307, 43 N. E. 156.

CASES
IN THE
SUPREME COURT
OF
OREGON.

SHOBERT v. MAY.

[40 Or. 68, 66 Pac. 466.]

NEGLIGENCE is the Failure to Exercise that Degree of Care and Forethought which a prudent person might be expected to use under similar circumstances. The degree of care necessary to be exercised must always be commensurate with the danger incident to, or reasonably to be apprehended from, the instrumentalities used, and is measured by the extent of the legal duty owing to the person who might sustain injury from any neglect in the use of such agencies. (p. 454.)

NEGLIGENCE—Care Which Must be Exercised by Storekeepers Toward their Patrons.—He who maintains a store for the sale of goods impliedly solicits patronage, and one who accepts the invitation to enter is not a trespasser nor a mere licensee, but is rightfully on the premises by invitation, and there arises in his favor a legal duty which demands reasonably safe arrangements for his protection. (p. 454.)

THE NEGLIGENCE of the Defendant is Always a Question for the Jury, though there is no conflict in the evidence, and it is error for the court to instruct them, as a proposition of law, that upon the conceded facts the defendant was guilty of negligence. (pp. 456. 457.)

Dolph, Mallory, Simon & Gearin, for the appellants.

Mitchell & Tanner, for the respondent.

MOORE, J. This is an action to recover damages for a personal injury, alleged to have been caused by the defendants' negligence. The plaintiff's testimony is to the effect that on March 14, 1899, at about 5 o'clock P. M., he entered the defendants' hardware store at Portland to purchase some hinges, and being informed by a clerk that the desired articles might possibly be found in the second story, and directed to a stairway leading thereto, he proceeded in that direction, and, the day being cloudy, and having no warning of danger ahead, walked into an elevator well and fell to the cellar, breaking his leg, whereby he became permanently crippled. An employé of the defendants, as their witness, testified that the side of the elevator well into which the plaintiff walked has a post at each corner, between which a wooden bar, one by six inches, placed about

between the parties as a question of law. The fact of negligence is very seldom established by such direct and positive evidence that it can be taken from the ⁷² consideration of the jury and pronounced upon as a matter of law. On the contrary, it is almost always to be deduced as an inference of fact from several facts and circumstances disclosed by the testimony, after their connection and relation to the matter in issue have been traced, and their weight and force considered. In such cases the inference cannot be made without the intervention of a jury, although all the witnesses agree in their statements, or there be but one statement, which is consistent throughout." To the same effect, see *Railroad Co. v. Stout*, 17 Wall. 657.

There are to be found expressions of judicial utterance which at first glance would seem to support the theory adopted by the court. Thus, in *Gagg v. Vetter*, 41 Ind. 228, 13 Am. Rep. 322, Mr. Justice Buskirk says: "The question of negligence is one of mingled law and fact, to be decided as a question of law by the court when the facts are undisputed or conclusively proved, but not to be withdrawn from the jury when the facts are disputed and the evidence conflicting." In *Louisville etc. Canal Co. v. Murphy*, 9 Bush, 522, it is said: "When the facts are conceded upon which the question of negligence is based, it then becomes a question of law as to whether a case of negligence has been made out." Many excerpts to the same effect might be collated, but a careful examination of the cases from which they could be extracted will show that in nearly every instance the language was intended to apply either to a motion for a judgment of nonsuit, or upon a request to instruct the jury to find for the defendant. In other words, when the uncontradicted testimony and the only inference deducible therefrom conclusively shows that the plaintiff upon whom the burden of proof rests has not made out a case of negligence sufficient to be submitted to the jury, or if his negligence has contributed to the injury of which he complains, the court may take the case from the jury and decide the issue as a question of law. Mr. Chief Justice Lord, in *Durbin v. Oregon Ry. etc. Co.*, 17 Or. 5, 11 Am. St. Rep. 778, 17 Pac. 5, discussing this question, says: "It is true that negligence is ordinarily a question of fact for the jury to ⁷³ determine from all the circumstances of the case, and that the cases where a nonsuit is allowed are exceptional, and confined to those, as here, where the uncontradicted facts show the omission of acts which the law adjudges negligent": See, also, *McBride v. Northern Pac. R. Co.*, 19 Or. 64, 23 Pac. 814;

Blackburn v. Southern Pac. Co., 34 Or. 215, 55 Pac. 225. This is as far as the rule ought reasonably to be extended, and in cases where the negligence of the defendant is to be determined, notwithstanding there may be no conflict in the testimony, that party, in our judgment, is entitled, under the organic law of the state (Const., art.1, sec. 17), to the verdict of a jury, unless waived, to the effect that he has not exercised that degree of care that the law exacts under all the circumstances of the case, before he can be compelled to respond in damages.

Other exceptions were taken and allowed, but the matters excepted to, if prejudicial error was thereby committed, can probably be avoided at a retrial of the cause. For the error in giving the instruction complained of, the judgment is reversed and a new trial ordered.

That the Question of Negligence is one of law for the court, if the evidence is not in conflict, and but one reasonable inference can be drawn from the facts, is a proposition often met with in the decided cases: See **Heinmann v. Kinnare**, 190 Ill. 156, 83 Am. St. Rep. 123, 60 N. E. 215; **Tully v. Philadelphia etc. R. R. Co.**, 2 Penna. (Del.) 537, 82 Am. St. Rep. 425, 47 Atl. 1019; **Kilpatrick v. Grand Trunk Ry. Co.**, 72 Vt. 263, 82 Am. St. Rep. 939, 47 Atl. 827; **Consolidated Traction Co. v. Scott**, 58 N. J. L. 682, 55 Am. St. Rep. 620, 34 Atl. 1094; **Borden v. Daisy Roller Mill Co.**, 98 Wis. 407, 67 Am. St. Rep. 816, 74 N. W. 91; **Watson v. Portland etc. Ry. Co.**, 91 Me. 584, 64 Am. St. Rep. 268, 40 Atl. 699; **Wade v. Columbia etc. Power Co.**, 51 S. C. 296, 64 Am. St. Rep. 676, 29 S. E. 233. We do not interpret the above decisions as adjudging that the court may, in any case as a matter of law, pronounce the defendant guilty of negligence. However, it is held in **Magoffin v. Missouri Pac. Ry. Co.**, 102 Mo. 540, 22 Am. St. Rep. 798, 15 S. W. 76, that where facts admitted by stipulation make a prima facie case of negligence on the part of the defendant, and are un rebutted and undisputed by him, it is the duty of the court to direct the jury to find a verdict for the plaintiff: See, too, **Fullerton v. Fordyce**, 121 Mo. 1, 42 Am. St. Rep. 516, 25 S. W. 587; **Savannah etc. Ry. Co. v. Evans**, 115 Ga. 315, 90 Am. St. Rep. 116, 41 S. E. 631.

LADD v. HOLMES.

[40 Or. 167, 66 Pac. 714.]

SPECIAL LEGISLATION.—A Statute Providing for Primary Elections in cities of ten thousand or more population, “as shown by the last state or federal census,” though applicable to only one city when enacted, extends to all that subsequently may reach such population, and is not special or local. (p. 466.)

ELECTIONS.—The Words “Free” and “Equal” in a constitutional provision that all elections shall be free and equal, signify

that elections shall not only be open and untrammelled to all endowed with the elective franchise, but shall be closed to all not in the enjoyment of such privilege. (p. 466.)

PRIMARY ELECTIONS.—A Statute Requiring primary elections for the selection of delegates to nominating conventions provides for elections "authorized by law and not elsewhere provided for by the constitution," within section 2, article 2 of the Oregon constitution, prescribing the qualifications of electors. (p. 467.)

A PRIMARY ELECTION LAW Limiting the Electoral Privilege at the respective primaries to party members is constitutional. (p. 467.)

A PRIMARY ELECTION LAW Denying Its Privileges to parties casting less than three per cent of the vote at the preceding election, but providing a mode of obtaining representation on the official ballot for such parties, is constitutional. (p. 469.)

PRIMARY ELECTION.—Every Elector Should be as Free to express his choice of a candidate for office as to denote his choice of an office at the polls. (p. 472.)

PRIMARY ELECTIONS.—Party Management and Affairs, so far as they concern the naming of candidates for public office, are proper objects of legislative supervision. (p. 473.)

PRIMARY ELECTION LAW—Invasion of Party Affairs.—A primary election law providing for the appointment of judges and clerks of the election by the county court, prescribing a test for party affiliation, and directing the manner of the election of committeemen, fixing their terms of office, and specifying their duties, is not an unwarranted interference with party management. (p. 475.)

PRIMARY ELECTIONS—Nonregistered Voter.—The Oregon primary election law providing that no one may vote unless "he shall have complied with the requirements of the law relating to registration of electors, and shall be entitled to vote at the ensuing general election," does not close the doors to all electors who had not secured registration prior to primary day. They may vote under certain conditions. (p. 476.)

PRIMARY ELECTIONS—Special Election.—It is no valid objection to a primary election law that it makes no provision for special elections. (p. 476.)

PRIMARY ELECTION LAW.—The Country Precincts are not discriminated against under sections 24 and 25 of the Oregon primary election law. (p. 476.)

TITLE OF PRIMARY ELECTION LAW.—A section of a statute relating to the appointment of a county managing committee, and its functions and duties, is within the purview of the title of an act, "To provide for primary elections in cities . . . and providing for the manner of conducting the same," etc. (p. 476.)

PRIMARY ELECTIONS—Expenses.—The Legislature may impose the expense of primary elections in a city upon the whole county wherein it is located. (pp. 476, 477.)

Edw. W. Bingham and Wallace McCamant, for the appellants.

George E. Chamberlain, Charles H. Carey, and Charles E. Lockwood, for the respondent.

¹⁶⁹ WOLVERTON, J. This is a suit to enjoin the clerk of the county court of Multnomah county from incurring any pecuniary liability in behalf of the county under the acts passed by the legislative assembly at its last session for the regulation of primary elections within the city of Portland, known as the Morgan and Lockwood acts, the evident purpose being to test the constitutionality of both acts. The circuit court declared the Morgan act invalid, but sustained the other, and the plaintiffs appeal.

The defendant not having appealed, there are left for our consideration the questions presented as they have relation to ¹⁷⁰ the Lockwood act only. The plaintiffs are all taxpayers of Multnomah county, and reside within the city of Portland, except Bain, who lives outside of the city limits. McKercher belongs to the Prohibition party, which polled less than three per cent of the entire vote cast in the county at the last general election, while Bain has no party affiliations. Thus are brought into the record all classes of individuals affected by the act in question, as it respects their personal rights and privileges under the constitution. The act provides, *inter alia*, that "elections hereafter held in any incorporated city of the state containing a population of ten thousand or more, as shown by the last state or federal census, by any voluntary political association or party, for the purpose of selecting delegates to any convention to nominate candidates for public office, shall be held under the provisions of this act, and such elections shall be styled primary elections": Laws 1901, p. 317. But it is not to be construed to affect direct nominations without conventions, or nominations by assemblages or electors, as may otherwise be provided for by law. It is made the duty of the county clerk to designate a day, not less than sixty days before any general election, to be known as "Primary Day." Any and all political parties or associations which at the election next preceding polled a sufficient percentage of the entire vote in the state, county, city, precinct, or other electoral district for which nominations are to be made by the convention, to be entitled to make nominations as a political party or association under the laws of the state governing general elections, shall be entitled to vote at such primary election for delegates to their respective party conventions. No nomination made by any convention of delegates shall be deemed lawfully made, or be printed upon the sample or official ballot for use in any general or municipal election, unless such delegates were selected by a primary election held

in accordance with this act. Not less than seven days before the time designated for holding the elections the managing committee of the political party desiring to hold a convention of delegates shall cause notice to be given, designating the number of delegates ¹⁷¹ to be selected, and the apportionment thereof to each election precinct. Provision is made for the nomination of delegates, and for having them certified by the county clerk and placed upon the official ballot, which is the only one that may be used at the polls. The judges and clerks of the general election, as selected by law, are required to serve at the primary election. If an elector is challenged, an oath may be administered, and he may be examined touching his qualifications as an elector at that election, and as a member of the political party or association whose ticket he may desire to vote, and, in determining his residence and qualification, the judges shall be governed by the rules for the conduct of general elections, so far as applicable; but no person is entitled to vote a ticket of any political party unless he resides in the precinct and shall have complied with the requirements of the law relating to the registration of electors, "nor unless, if challenged, he shall swear or affirm that he voted for a majority of the candidates of such party or association at the last election, or intends to do so at the next election": Laws 1901, p. 323. The names of the electors voting are to be counted, and the number written in each of the poll-books and certified by the judges and clerks; and the returns are to be canvassed by the county clerk with the assistance of two justices of the peace, who shall certify and publish the names of the persons having the highest number of votes, and those only shall be entitled to sit in the convention. Parties are entitled to make provision as they deem proper for the election of delegates for outside precincts. One committeeman may be selected by each city or county convention from each election precinct, who shall be the representative of his party in and for such precinct, and the committeemen from all parts of the county shall constitute the county central committee. The term of office is two years from the date of the first meeting, immediately following the election, and, in case of a vacancy occurring, the remaining members may fill it.

To pursue logically the inquiry presented by the record, we have first to consider whether the act is special or local, and ¹⁷² within the inhibition of the state constitution, article 4, section 23, subdivision 13, as to the passage of any law "providing for opening and conducting the elections of state, county, or town-

ship officers, and designating the places of voting," because, if it is, there is no necessity for looking further, as it disposes of the case at once. It is insisted that by the express provisions of the act it was intended to have operation in the city of Portland alone—that being the only city with a population of ten thousand—and that it can never extend to or include other cities, should they come to have or possess as great or larger population. If such is the true intendment of the act, the point would be well taken, as it would then be local, or, as the term is defined by Mr. Sutherland, "special as to place": Sutherland on Statutory Construction, sec. 127. "A local act," says Mr. Justice Lord, in *Maxwell v. Tillamook County*, 20 Or. 495, 500, 26 Pac. 803, 804, "applies only to a limited part of the state. It touches but a portion of its territory, a part of its people, or a fraction of the property of its citizens." A law may be general, however, and have but a local application, and it is none the less general and uniform, because it may apply to a designated class, if it operates equally upon all the subjects within the class for which the rule is adopted; and, in determining whether a law is general or special, the court will look to its substance and necessary operation as well as to its form and phraseology: *People v. Hoffman*, 116 Ill. 587, 56 Am. Rep. 793, 5 N. E. 596, 8 N. E. 788; *Nichols v. Walter*, 37 Minn. 264, 33 N. W. 800. This is the accepted rule everywhere.

Referring to a provision in the constitution of North Dakota of similar import to the one here invoked, Mr. Chief Justice Corliss says: "To say that no classification can be made under such an article would make it one of the most pernicious provisions ever made in the fundamental law of the state. It would paralyze the legislative will. It would beget a worse evil than unlimited legislation—grouping together without homogeneity of the most incongruous objects under the scope of an all-embracing law": *Edmonds v. Herbrandson*, 2 N. Dak. 270, 273, 50 N. W. 970, 971. The ¹⁷³ greater difficulty centers about the classification. It may not be arbitrary, and requires something more than a mere designation by such characteristics as will serve to classify. The mark of distinction must be something of substance, some attendant or inherent peculiarity calling for legislation suggested by natural reason of different character to subserve the rightful demands of governmental needs. So that, when objects and places become the subject of legislative action, and it is sought to include some and exclude others, the inquiry should be whether the distinc-

tive characteristics upon which it is proposed to found different treatment are such as in the nature of things will denote in some reasonable degree a practical and real basis for discrimination: *Sutherland on Statutory Construction*, secs. 127, 128; *Nichols v. Walter*, 37 Minn. 264, 33 N. W. 800; *Edmonds v. Herbrandson*, 2 N. Dak. 270, 50 N. W. 970, 971; *State v. Hammer*, 42 N. J. L. 435; *People v. Board of Supervisors*, 185 Ill. 288, 56 N. E. 1044. Accordingly, it was held that a law general in its scope, framed upon a classification governed by these distinctive principles, is not special or local because there happens to be but one individual of the class, or one place in which it has actual and practical operation: *Van Riper v. Parsons*, 40 N. J. L. 1, 40 N. J. L. 123, 29 Am. Rep. 210. A statute, however, which is plainly intended to affect a particular person or thing, or to become operative in a particular place or locality, and looks to no broader or enlarged application, may be aptly characterized as special and local, and falls within the inhibition. Of such is *State v. Mitchell*, 31 Ohio St. 592. There the act complained of was made applicable to "cities of the second class having a population of over thirty-one thousand at the last federal census"; the language quoted being construed as signifying the federal census last taken prior to the passage of the act, which made it operative in the single city of Columbus, and it could never extend to or include other cities, notwithstanding they might advance to a like population. The act was, therefore, although general in terms, purely local in its operation. So, in *State* ¹⁷⁴ *v. Anderson*, 44 Ohio St. 247, 6 N. E. 571—a case involving an act creating the office of police judge in all cities of the second and third classes, having a population at the last federal census of sixteen thousand five hundred and twelve, and no more—it was held that the act was special, as it could under no condition apply to any other city than Akron. To the same purpose are *Mott v. Hubbard*, 59 Ohio St. 199, 53 N. E. 47; *Nichols v. Walter*, 37 Minn. 264, 33 N. W. 800; *Edmonds v. Herbrandson*, 2 N. Dak. 270, 50 N. W. 970, 971; *Devine v. Commissioners*, 84 Ill. 590; *Commonwealth v. Patton*, 88 Pa. St. 258. In all these the language of the acts concerned was so restrictive as to confine their operation strictly to definite localities—so much so, as was said in the last case cited, that the legislature may as well have pointed out the places by naming them, and thus have excluded all others. It may be stated as a positive rule of general application that all acts or parts of acts attempting to

create a classification of cities by population which are confined in their operation to a state of facts existing at the date of their adoption or any particular time, or which by any device or subterfuge exclude other cities from ever coming within their purview, or based upon any classification which in relation to the subject concerned is purely illusory, or founded upon unreasonable, obnoxious, or ill-advised distinctions, are ineffectual, as not being founded in substance, are inimical to the constitutional interdiction against special and local legislation, and are therefore null and void: *State v. Donovan*, 20 Nev. 75, 15 Pac. 783.

Upon the other hand, many acts have been sustained, and are constantly being upheld, that have local application merely, where they are based upon a reasonable and proper classification. *People v. Hoffman*, 116 Ill. 587, 56 Am. Rep. 793, 5 N. E. 596, 8 N. E. 788, is a case which involved a law containing an exception requiring supervisors in a county containing a soldiers' home to provide a polling place within the inclosure of such home. So in *Hanlon v. Board of Commissioners*, 53 Ind. 123. There the act declared that the county auditor in each county ¹⁷⁵ should receive increased compensation "when the population of the county exceeds fifteen thousand, as shown by the last preceding census taken by the United States." See, also, *State v. Reitz*, 62 Ind. 159, 30 Am. Rep. 203, where the act gave the judges of the criminal courts two thousand dollars per annum, with a provision "that in all counties having a population of forty thousand the salary . . . shall be two thousand five hundred dollars"; and, in *City of Indianapolis v. Navin*, 151 Ind. 139, 47 N. E. 525, 51 N. E. 80, where the act was made to apply only to street railroad companies operating in cities of one hundred thousand or more population. A similar case is *Tuttle v. Polk*, 92 Iowa, 433, 60 N. W. 733, and many others may be cited: See *People v. Wallace*, 70 Ill. 680; *People v. Onahan*, 170 Ill. 449, 48 N. E. 1003; *Wheeler v. City of Philadelphia*, 77 Pa. St. 338; *Kilgore v. Magee*, 85 Pa. St. 401; *Seabolt v. Commissioners*, 187 Pa. St. 318, 41 Atl. 22; *Varney v. Kramer*, 62 N. J. L. 483, 41 Atl. 711; *Thomason v. Ashworth*, 73 Cal. 73, 14 Pac. 615; *In re Church*, 92 N. Y. 1; *People v. Squire*, 107 N. Y. 593, 1 Am. St. Rep. 893, and note, 14 N. E. 820; *Darrow v. People*, 8 Colo. 417, 8 Pac. 661; *State v. Higgins*, 125 Mo. 364, 28 S. W. 638; *Dunne v. Kansas City Ry. Co.*, 131 Mo. 1, 32 S. W. 641; *Johnson v. City of Milwaukee*, 88 Wis. 383, 60 N. W. 270; *Boyd v. City of Mil-*

waukee, 92 Wis. 456, 66 N. W. 603; Harwood v. Wentworth (Ariz.), 42 Pac. 1025, 162 U. S. 547, 16 Sup. Ct. Rep. 890; Holmes Furniture Co. v. Hedges, 13 Wash. 696, 43 Pac. 944; State v. Stuht, 52 Neb. 209, 71 N. W. 941.

We come now to an interpretation of the statute, since we have ascertained the rule by which we may distinguish between a general and special or local law. Much has been said relative to the duty of the court to uphold the law, as constitutional, if it is possible to do so without doing violence to common reason and understanding. But we do not conceive the rules of construction in ascertaining the intendment of an act, and thereby determining whether it is within or without the constitution, to be different from those applicable ordinarily, ¹⁷⁶ where its true intendment and purpose are brought to the test for the ascertainment of its operative effect, for where the one is determined the other is resolved also. There is this, however, to be borne in mind: That by reason of the legislature having adopted the act, there goes with it a presumption that it is within the pale of the fundamental law, otherwise it would not have met with the approval of that body; and in every case where there exists, when proper tests have been brought to bear, a rational doubt upon the subject, it should be resolved in favor of its validity. Courts are never called upon to adopt a strained or unnatural construction for the specific purpose of upholding a law, and, when they have ascertained by fair and reasonable intendment that it is inimical to some fundamental provision, they will not hesitate to so declare. This is a solemn duty enjoined upon them by the settled law of the land, as well as by the oath which individual judges take to support the constitution, under which they derive their powers primarily. The act is to have operation in any incorporated city containing a population of ten thousand or more, "as shown by the last state or federal census." Portland, at the time of its passage, was the only city falling within the classification. This fact, as we have seen, does not derogate from the validity thereof. But does the language employed limit the operation of the act to that city alone, to the exclusion of other cities within the state that may subsequently acquire the prescribed population? If it does not, the next inquiry will be whether the classification is one founded upon some real and substantial, not fanciful, distinction, suggested and prompted by reason and experience. Some cases have been alluded to wherein the population forming the basis of classification was

referable to the last census, state or federal, naming but one, and the acts embodying the idea were all held to be invalid. By the present act both the state and federal census are named in the alternative. It is a matter of judicial cognizance that the federal census is taken at the close of a decade, while the state census is taken five years thereafter (Const., art. 4, sec. 5; Hill's Annotated Laws, sec. 2233), thus affording a census enumeration ¹⁷⁷ every five years—the last federal census having been taken in 1900, and that of the state in 1895. Now, it is reasonable to suppose that the legislature had this state of the law in mind when it adopted the act, and that it used the words "last state or federal census," not for the purpose of adopting the census of 1900 as an inflexible standard, but rather that the census, as taken from time to time, whether state or federal, should constitute the basis by which the classification should be governed. If the intention had been otherwise, the most natural expression would have been the "last federal census," which would have meant unmistakably the federal census of 1900, and the validity of the act would have been tested thereby to its destruction. The expression employed does not convey that idea at all, but was intended to signify, no doubt, the last preceding census, whether state or federal, so that in any period of five years other cities advancing to the designated standard will fall within the class, and be subject to the operation of the act. The identical language is used in the primary act of 1891, and its validity has never been questioned upon the ground that it was special or local, and the construction that we have given to the act in controversy has been adopted in actual practice and usage. Now, as to the other point, experience has shown that rules and regulations of more specific and stricter character are needful for properly controlling and governing elections in larger and more densely populated cities and towns than in the smaller ones, and in rural districts; so that a classification with respect to elections founded upon population is but a reasonable method of regulation, and the basis adopted affords an appropriate and legitimate distinctive characteristic for the purpose. We conclude, therefore, that the act in question is general, and not in contravention of the state constitution, article 4, section 23, subdivision 13. This disposes of the other contention, also, that the act is special and local, as providing for the punishment of crimes and misdemeanors. The offenses alluded to are crea-

tures of, and incident ¹⁷⁸ to, the act, and, it being general, the punishment was properly provided for.

This contention being resolved favorably to the validity of the act, we are next brought to the consideration of its appropriate relation to a group of constitutional provisions, as to each of which it is strenuously urged that it stands in positive contravention. These are article 1, section 20, and article 2, sections 1, 2. Article 2, section 1, provides that all elections shall be free and equal. To be free means that the voter shall be left in the untrammelled exercise, whether by civil or military authority, of his right or privilege; that is to say, no impediment or restraint of any character shall be imposed upon him, either directly or indirectly, whereby he shall be hindered or prevented from participation at the polls: *De Walt v. Bartley*, 146 Pa. St. 529, 28 Am. St. Rep. 814, 24 Atl. 185; *People v. Hoffman*, 116 Ill. 587, 56 Am. Rep. 793, 5 N. E. 596, 8 N. E. 788. The word "equal" has a different signification. Every elector has the right to have his vote count for all it is worth, in proportion to the whole number of qualified electors desiring to exercise their privilege. Now, if persons not legitimately entitled to vote are permitted to do so, the legal voter is denied his adequate, proportionate share of influence, and the result is that the election, as to him, is unequal; that is, he is denied the equal influence to which he is entitled with all other qualified electors: "Ballot Reform, Its Constitutionality" (John H. Wigmore), 23 Am. Law Rev. 719; *Edmonds v. Banbury*, 28 Iowa, 267, 271, 4 Am. Rep. 177; *Davis v. School Dist.*, 44 N. H. 398, 404; *Commonwealth v. McClelland*, 83 Ky. 686. So that the terms "free" and "equal," used as they are, correlatively, signify that the elections shall not only be open and untrammelled to all persons endowed with the elective franchise, but shall be closed to all not in the enjoyment of such privilege under the constitution.

Does the election provided for by the act in controversy come within the purview of section 2, article 2 of the constitution, which provides that, "in all elections not otherwise provided for by this constitution, every white male citizen of the ¹⁷⁹ United States, of the age of twenty-one years and upward, who shall have resided in the state during the six months immediately preceding such election, and every white male of foreign birth of the age of twenty-one years and upward, who shall have resided in this state during the six months immediately preceding such election, shall have declared his intention to become a

citizen of the United States one year preceding such election, conformably to the laws of the United States on the subject of naturalization, shall be entitled to vote at all elections authorized by law"? We believe that it does. We had occasion to construe this clause in *Harris v. Burr*, 32 Or. 348, 52 Pac. 17. Its significance, as then ascertained, is that the individuals therein designated are entitled to vote at all elections authorized by law, not otherwise provided for by the constitution. School elections are controlled by the constitutional provision whereby the legislative assembly is required to provide by law for the establishment of a uniform and general system of common schools. Therefore, it was held that such elections were otherwise provided for by the constitution, and that a law extending to women the privilege of voting at school elections was not inimical to section 2, article 2. It seems to us hardly a matter of serious controversy that the elections presently provided for are such as are authorized by law. They are, in practical effect, required to be held by all parties polling a three per cent vote, as no convention nomination can be legally made unless the delegates attending such convention from the precincts included within a city falling within the class prescribed are selected at such primary election. The judges of election appointed under the general law are authorized and required to preside at the primary election, and to count and certify the vote; and the county clerk, a public functionary, is, with the assistance of two justices of the peace, required to make abstracts from the returns, and thereupon to publish the result, the delegates receiving the highest number of votes being entitled to sit in the convention, and the election is held at public expense. With all this, there is certainly an election authorized by law, ¹⁸⁰ and such a one as is not elsewhere provided for by the constitution: *Spier v. Baker*, 120 Cal. 370, 52 Pac. 659; *Britton v. Board*, 129 Cal. 337, 61 Pac. 1115. The act is none the less valid because it provides for a party election, or, to speak more precisely, elections had at party primaries. All electors of parties authorized or required to hold such elections are entitled to vote at their respective party primaries, and not elsewhere. It is not true that every citizen accorded the elective franchise under the constitution is entitled to vote at all elections. A citizen of one county is not entitled to vote at an election held in another county for local officers, and a citizen of one precinct is not entitled to vote in another, nor of one city or town in another; so that the right of all electors to vote does not extend to all elec-

tions authorized by law, but is dependent largely upon the place of residence, and the nature of the election to be held. So it is where party primary elections are held, such as are authorized and required by law, and under the supervision and inspection of public functionaries; it is not a violation of the constitution that all electors are not permitted to vote at a particular party election. Electors of one party have no desire, unless prompted by sinister or evil motives, nor have they any inherent right, within or without the constitution, to vote at some other party primary or election; hence no right or privilege of which they can complain has been intrenched upon or violated. We see no objection to the legislature providing for party elections, and limiting the electoral privilege to party members. The exclusion of other party members from participating in such elections is not an infringement or denial of a constitutional right or privilege.

The state constitution, article 1, section 20, provides that "no law shall be passed granting to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens." Mr. McKercher complains (he being a Prohibitionist, and a member of a party casting less than three per cent of the vote at the preceding general election) that there is an unjust and unwarranted discrimination ¹⁸¹ against his party as a class, as no provision is made in the act whereby his party may hold primary elections for the purpose of selecting representatives to a convention of delegates, and hence that he and his party are denied a privilege granted to parties casting more than three per cent of the vote. The requirements of the act, however, do not amount to more than a regulation suited to the larger number of adherents entitled to participate, for the better safeguarding and preservation of the privileges of electors. Under the Australian ballot law, only such parties as have cast a three per cent vote are entitled to have the names of their candidates printed upon the official ballot through the instrumentality of a convention of delegates. Parties of a smaller membership can only secure a place upon such ballot by means of an assembly of electors or a certificate of nomination by individual electors; and this is held to be a regulation merely, and not an infringement of any constitutional right of the minor or smaller parties, or the members thereof. Such a provision was brought to the test in Pennsylvania in *De Walt v. Bartley*, 146 Pa. St. 529, 28 Am. St. Rep. 814, 24 Atl. 185, where the insistence was the same as here, respecting which

Mr. Chief Justice Paxson says: "The contention is plausible, but unsound. The act does not deny any voter the exercise of the elective franchise because he happens to be a member of a party which at the last general election polled less than three per cent of the entire vote cast. The provision referred to is but a regulation, and we think a reasonable one, in regard to the printing of tickets." So, in Wisconsin, where, as in Pennsylvania, the Australian ballot law was challenged upon the distinctive ground that it was an unwarrantable discrimination between different classes of voters, it was held, in effect, that a reasonable qualification for party representation upon the official ballot was not a constitutional discrimination between such classes: *State v. Anderson*, 100 Wis. 523, 76 N. W. 482. To the same purpose is *State v. Poston*, 58 Ohio St. 620, 51 N. E. 150, and *Ransom v. Black*, 54 N. J. L. 446, 24 Atl. 489, 1021. The ¹⁸² privilege of holding primaries under regulations prescribed by law, if it can be denominated a privilege, is but a means employed for the designation or certification of delegates whose business it becomes to name candidates for public office, the ultimate purpose being to afford party representation upon the official ballot. The minor parties are afforded ample opportunity for obtaining a like representation thereon, and, while a different mode of procedure is pointed out for the accomplishment of the purpose, there is no denial or infringement upon the ultimate right or privilege of voting for the candidate of their choice with equal ease and facility. The difference in the mode of obtaining representation upon the official ballot is reasonably suited to the proper direction, supervision, and control of the greater parties at their primaries, with a view of securing a free and equal ballot; and the system was so designed, and cannot be considered else than a regulation looking to that end. There is no discrimination against the minor parties, except in the mode of certifying their nominations, as they may yet hold primaries and conventions, and this is justified by the substantial difference in party conditions. The analogy between this and the Australian ballot law in respect to obtaining a place upon the official ballot is apparent and complete.

Another contention strongly pressed is that the system of primary elections provided for by the act unwarrantably interferes with the party management of political concerns. It is not claimed that any positive constitutional provision is intrenched upon, except as sections 26 and 33 of article 1 of the Bill of Rights may affect the matter incidentally. It is said in

the brief that, "independent of any expression in the fundamental law of the state, there are certain political rights, incidental to those guarantied by the constitution, which cannot be abridged by the legislature." In elaboration of that idea, as applicable generally, we quote from the language of Mr. Justice Chase in *Calder v. Bull*, 3 Dall. 386—a case cited by counsel. He says: "There are certain vital principles in our free republican governments which will determine and overrule ¹⁸³ an apparent and flagrant abuse of legislative power, as to authorize manifest injustice by positive law, or to take away that security for personal liberty or private property for the protection whereof the government was established. An act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact cannot be considered a rightful exercise of legislative authority. . . . It is against all reason and justice for a people to intrust a legislature with such powers, and therefore it cannot be presumed that they have done it." *Citizens' Sav. Assn. v. Topeka*, 20 Wall. 655, 662, is to the same purpose. The Bill of Rights declares (article 1, section 33) that the enumeration of rights and privileges therein contained shall not be construed to impair or deny others retained by the people. The rights insisted upon here, it is thought, are among those retained or reserved. By sections 26, article 1, there can be no restraint of any of the inhabitants of the state from assembling together in a peaceable manner to consult for their common good. Based upon these principles, the plaintiffs assert that they and all other citizens of Oregon are vested with certain political rights that are invaded by the act, among which are the right of association with others for political purposes, and the right to protect their organizations from invasion and control by those whose purposes in politics are adverse. This leads to an inquiry touching those political rights, and to what extent they may be regulated and restricted by legislative action.

In the United States, the history of parties begins with the constitutional convention of 1787. It extends throughout all the ramifications and complexities of the national and state governments, and continues to the present time. Parties are important factors in propagating, maintaining, and promulgating governmental policy; and it is largely through their operation and influence that the destiny of the country is molded and established, and it may be that they are absolutely essential to the maintenance of a representative form of government. Before the constitution it was the custom in Massa-

chusetta, and some other colonies, perhaps, for a coterie of leading ¹⁸⁴ citizens to put forward candidates for office, and these were generally accepted without question. Clubs sprang up in some localities, especially in New York, and became the organs of groups and parties, and brought out candidates, while in New England the clergy participated in leadership. "Presently," it is said, "as the democratic spirit grew, and people would no longer acquiesce in self-appointed chiefs, the legislatures began to be recognized as the bodies to make nominations for the higher federal and state offices. Each party in Congress nominated the candidate to be run for the presidency, each party in a state legislature the candidate for governor, and often for other places also."

This lasted through the early decades of the nineteenth century, but as party struggles became more intense, a closer and more comprehensive organization was established, which satisfied the claims of the party leaders, concentrated the efforts of individuals, and knit them together for a common purpose, while it expressed absolute equality of all voters, and the right of each to participate in the selection of candidates and the adoption of party platforms. This new party regime grew and ripened, as it respects the Democratic party, about the year 1835, and, as to the Whigs, some years later; and, when the Republican party sprang up, it adopted the system in all of its essential features. The true theory of popular sovereignty requires that the ruling majority must name its own standard bearers or candidates, must define its policy, and in every way express its own mind and will; and the system thus developed and matured is in accord with that theory. It is strictly representative throughout, is not a mere contrivance of party intrigue, or for preventing dissensions, but an essential feature of matured democracy: 2 Bryce's *American Commonwealth*, c. 59 (entitled "Party Organizations"), p. 44. It will be seen, therefore, that the system in vogue has developed under the constitutions, federal and state, although not a matter of special concern at the time of their adoption. The parties or organs of the system are voluntary associations, pure and simple, while the functions they perform relate in the main to public ¹⁸⁵ concerns. The primary is the initial step in the system looking to the nomination of candidates whose names are to find a place upon the official ballot, and through its agencies to be submitted to the qualified electors for an expression of their choice. At the top, the constitution expressly declares there shall be a free and untrammelled ballot,

but its spirit pervades the whole, and reaches back to the inception of the choice of a candidate; so that every elector must be as free to express his own choice of a candidate as to denote his choice of a public officer at the polls. If it were not so, of what avail would be the ballot in the hands of the people? Once the stream is polluted at its source, access to its waters, however free, will not serve to purify it. So it is if the people or party members are deprived of their free choice of candidates, their sacred privilege of exercising an elective franchise is stripped of its virtue. Mr. Bryce, in speaking of party management and the agencies employed, including the primary, in securing nominations and promoting their selection by the people, says: "These details have more significance and make more difference to the working of the government than many of the provisions of the constitution itself": 2 Bryce's American Commonwealth, c. 60 (entitled "Party Organizations"), p. 57. It would seem, from these observations and conditions, that party management is of such vital importance to the public and the state as that its operation, in so far as it respects the naming of candidates for public office, is an object of special legislative concern, to see that the purposes of the constitution are not perverted, and the people shorn of a free choice.

No attempt is made to specify all the particulars in which the act in question invades the right of party management, but there are three which have become prominent in the discussion. These are the appointment of judges and clerks of the election by the county court, the test prescribed for indicating party affiliation, and the manner pointed out for the election of committeemen, fixing their terms of office, and specifying their duties. It is admitted that the legislature has power to require parties to keep a registry of voters in precincts, adopt ¹⁸⁶ rules and regulations for purging from the lists the names of persons as they die, move out of the precinct, or change their politics, and to provide for a secret ballot at their primaries.

The primary act of 1891 requires parties to give notice of the time of holding primaries in cities of two thousand five hundred or more of population, and prescribes the manner of giving it; designates the number of judges to be appointed, fixes their qualifications, and requires them, together with the clerks to be named, to perform their functions under the sanction of an oath; and directs that their returns shall be made to the county clerk, as well as to the political organizations under whose authority such primary elections are held. These are

regulations, also, which are virtually conceded to have been authoritatively made by the legislature. There is here some regulation of the acts of political parties, looking to the nomination of candidates for public office; and how much further the law-making power may be permitted to go, or where it shall stop, is not pointed out. But it seems to us that if the power is appropriate to requiring an oath of judges and clerks, such as is prescribed for the judges and clerks at general elections, it is also adequate to the naming of these officers through the instrumentality of the civil authorities. It is urged that partisan boards should preside over partisan primaries; and it might be better that they should; but that is a matter of policy, and not of power. So, too, with the manner in which committeemen shall be selected, the designation of their duties, and their term of office. If a managing committee may be required to give notice in a particular manner touching an anticipated primary election and appoint judges, why may not the legislature go a step further, and provide for the selection of its members, denoting the terms of office, and prescribe their duties? If the power exists in the one case, where is the line to be drawn to mark the boundary? It seems to us that when any supervision of the acts of political parties looking to the selection of candidates to be submitted to the suffrages of the people under the constitution is conceded to be within the power of the legislature, a power commensurate with a supervision ¹⁸⁷ of the entire scheme of nominations for public office is also conceded. In the case of *People v. Democratic General Committee of Kings County*, 164 N. Y. 335, 58 N. E. 124, it was held that, under a law requiring each political party to have a general committee in each county, the members to hold their office for one year, and to be selected at primary elections in the manner pointed out by law, a member thereof could not be removed by the committee during the term for which he was elected, and, again, that legislative action contrary to, and inconsistent with, the rules and regulations of parties, and of conventions and committees thereof, will effectually displace and supplant all such rules and regulations, and render them nugatory. Here is positive judicial recognition of legislative authority for the supervision of party affairs, as it concerns nominations for public office, that goes beyond any provision of the Lockwood act.

The test prescribed for participating in a party primary is that the elector "voted for a majority of the candidates of such

party or association at the last election, or intends to do so at the next election." The authority of the legislature to prescribe any test whatever is challenged; that being a matter, it is contended, wholly within the discretion of the parties themselves. The California primary act of 1899 was declared inoperative because it prescribed no test whatever, and permitted persons of different party affiliations to vote for party delegates: *Britton v. Board of Election Commrs.*, 129 Cal. 337, 61 Pac. 1115. Hence it would seem that a test is necessary. But who shall prescribe it? Neither the legislature nor the parties can prescribe any test, it is plain, that will operate to exclude legal voters of the same political faith, nor admit any that are not legally qualified, as otherwise the election would not be free and equal. The election being authorized by law, parties cannot claim any higher authority touching the qualifications of voters thereat than the legislature. If so, they might easily subvert the will of the legislature, and render the law nugatory for any substantial purpose. So the question recurs as to whether this feature is one of regulation, also. We think it is,¹⁸⁸ and within the power of the legislature to prescribe the rules relative thereto under the constitution. The fundamental principle upon which such legislative authority proceeds, and must proceed, is that its ultimate purpose is the election of public officers by a free and equal choice of the qualified electors. A free and equal choice of such officers includes a free and equal choice by party members of the delegates whose function it becomes to select partisan candidates, and the legislative authority is adequate to prescribe all reasonable rules and regulations looking to the security and safeguarding of these sacred rights and privileges. In so doing, the right of the adherents of the respective parties to assemble and consult together for their common good is in no way impinged upon, and they may still advocate and promulgate political doctrines and principles without restriction, so that it is done in a peaceable manner, and does not tend to moral obliquity, the infraction of the law (*Davis v. Beason*, 133 U. S. 333, 10 Sup. Ct. Rep. 299), or the destruction of the government itself. In so far as *Britton v. Board*, 129 Cal. 337, 61 Pac. 1115, is not in harmony with this view, if it may be so considered, we cannot approve it.

These observations are applicable to other features of the law to which objections are made. Is the test a reasonable regulation by which to ascertain party affiliation? Mr. Bryce says the

usual test adopted by parties is, "Did the claimant vote the party ticket at the last important election—generally the presidential election, or that for the state governorship?" 2 Bryce's American Commonwealth, c. 60, p. 55. The Wisconsin acts of 1895 and 1897 prescribe, in effect, that precise test: Wis. Sess. Laws 1895, p. 567, Wis. Sess. Laws 1897, p. 699. The California act of 1897 provides that if a person challenged make oath that it was his bona fide present intention to support the nominees of the convention to which delegates are to be elected for such political party or organization, he should be entitled to vote: Cal. Stats. 1897, p. 124. The act was declared unconstitutional, but not upon that ground: *Spier v. Baker*, 120 Cal. 370, 52 Pac. 659. And the legislature evidently ¹⁸⁹ so understood it, as at its session of 1901 it passed another act containing precisely the same test to be applied at a party primary election: Cal. Stats. 1901, p. 615. By the New York act, the elector must declare that he is in general sympathy with the principles of the party at whose primary he desires to vote; that it is his intention to support generally at the next general election, state or national, the nominees of such party for state or national offices; and that he has not enrolled with or participated in any primary election or convention of any other party since the first day of the preceding year: N. Y. Sess. Laws 1898, vol. 1, c. 179, p. 334. This is as far as we have been able to find precedent, and we are impressed that the New York provisions are better calculated to serve the purpose for which they are intended than the others; and yet it is concededly impossible to provide any test by which all fraud and illegal voting may be detected and prevented. Much must be left to the legislature to determine, and, so long as it cannot be said that the test adopted is inapt and unreasonable, it ought to be permitted to stand; hence we are constrained to hold that the present law is valid as it respects that specific objection.

Special attention is directed to section 14, relating to persons entitled to vote at the primary. The language is: "But no person shall be entitled to vote a ticket of any political party or association unless he resides in the precinct where he offers to vote, shall have complied with the requirements of the law relating to registration of electors, and shall be entitled to vote at the next ensuing general election under the provision" of the registration law: Laws 1901, p. 323. Plaintiffs' counsel claim a significance for that clause which would close the door

to all electors who had not secured registration prior to primary day, but, when construed with the preceding section, it is apparent that it was not so intended. That section prescribes the usual oath to be propounded to electors at a general election, which indicates that a person entitled to vote must be a qualified elector at that particular election, not that he would be entitled to vote at the general election following. The evident ¹⁹⁰ purpose was to give operation to the registry act, so far as applicable, so that the voter must either register, or stand challenged at the primary polls, whereupon he shall produce proofs entitling him to vote, as required by section 16 of the registry act (Laws 1899, p. 128), before he may be allowed to do so.

Objection is made that the law makes no provision for any special election that may become necessary, but this is not vital, as the effect would be to relegate the parties to the law heretofore governing primary elections.

Another invasion of political management complained of is that there is a discrimination against country precincts; it being maintained that, by a reading of the last clause of section 24 in juxtaposition with the last clause of section 25, it becomes manifest that such precincts might be deprived of all representation in the county convention. Such an event, however, could hardly happen when it is considered that the managing committee is to be composed of a representative from each precinct in the county, who are to apportion the delegates in accordance with the party vote polled at the last preceding election.

It is next insisted that section 25 of the act which relates to the appointment of a county managing committee, and its functions and duties, is without the purview of the title of the act. The title is: "To provide for primary elections in cities having a population of more than ten thousand inhabitants, and providing the manner of conducting the same," etc. Now, the matter contained in the section alluded to is germane to the subject expressed, being a regulation connected with the holding of primaries, and is therefore within its purview, within the meaning of article 9, section 20 of the state constitution.

And, again, it is insisted that it was not competent for the legislature to impose the burden of primary elections within the city of Portland upon the whole county of Multnomah, which is made a special cause of complaint by Mr. Bain, who resides and is a taxpayer outside of the city limits. The answer to this, it seems to us, is that the expense is incident to, and in ¹⁹¹

pursuance of, a general law of the state, although it operates locally. The election is for the selection of precinct delegates and officers, which is properly a county charge: Board of Commrs. of Marion County v. Center Tp., 107 Ind. 584, 8 N. E. 625. This is unlike the case of Simon v. Northup, 27 Or. 487, 40 Pac. 560, where the attempt was made to impose a debt of the city upon the county which the county was neither under legal nor moral obligation to pay. Nor is the act one providing for a tax which is required to be equal and uniform, but it simply provides for the adjustment of a public burden which is appropriately incident to the county.

This disposes of all the questions involved, and, being favorable to the respondent, the decree of the court below will be affirmed.

As to Whether a Statute is Special or Local when it can apply to but one city within the commonwealth, see State v. Jones, 66 Ohio St. 453, 64 N. E. 424, 90 Am. St. Rep. 592, and cases cited in the cross-reference note thereto.

The Legislature is Competent to Regulate Elections, to the end of preserving their purity and the independence of voters, so far as the regulations adopted are reasonable: Taylor v. Bleakley, 55 Kan. 1, 49 Am. St. Rep. 233, 39 Pac. 1045; Whittam v. Zahorik, 91 Iowa, 23, 51 Am. St. Rep. 317, 59 N. W. 57; State v. McElroy, 44 La. Ann. 796, 32 Am. St. Rep. 355, 11 South. 133; De Walt v. Bartley, 146 Pa. St. 529, 23 Am. St. Rep. 814, 24 Atl. 185; note to Blair v. Ridgely, 97 Am. Dec. 266. Statutes requiring registration as a prerequisite to the right to vote are valid: Stallcup v. Tacoma, 13 Wash. 141, 52 Am. St. Rep. 25, 42 Pac. 541; note to Capen v. Foster, 23 Am. Dec. 642-651.

PACIFIC STATES SAVINGS, LOAN AND BUILDING COMPANY v. HILL.

[40 Or. 280, 67 Pac. 103.]

FOREIGN CORPORATION—Agent to Receive Service.—A loan association is not within the purview of a statute requiring foreign banking concerns to appoint a resident of the state as attorney on whom writs and process may be served. (p. 480.)

USURY.—A Contract of a Building and Loan Association which exacts from a borrowing member interest, and also dues on stock absolutely assigned to the association as a premium bid in consideration of the loan, is usurious, when the interest and dues in the aggregate exceed the legal rate of interest. (p. 481.)

CONFLICT OF LAWS.—A Contract for the Payment of money entered into bona fide in one place and made payable in another, is construed, governed, and enforced according to the law of the place where payable. (p. 482.)

USURY—Subterfuge.—Usury is a Moral Taint Wherever it exists, and no subterfuge should be permitted to conceal it from the eyes of the law. (p. 482.)

USURY.—A Loan by a Foreign Building and Loan association to a citizen of this state is solvable by its laws, notwithstanding the loan is stipulated to be paid at the domicile of the association, when such stipulation is designed to evade the usury laws of this state. (pp. 483, 484.)

The plaintiff is a corporation organized and having its principal place of business at San Francisco, California. On October 22, 1891, the defendant, J. L. Hill, applied for membership in the company and subscribed for seventy shares of stock. On October 24, 1891, a certificate for the desired stock was issued on the conditions that the shareholder should pay sixty cents monthly on each share until matured or withdrawn, and that when such payments on a share should amount to \$100, it should be deemed matured and might be retired. On the back of the certificate appears an assignment of sixty shares to the company, bearing date February 24, 1892. On the day of applying for membership, Hill also applied for a loan of \$3,000 on his bond and mortgage to secure the same on realty in Albany, Oregon. The venue of his verification, in making this application, is Lynn county, Oregon. Attached to the application is a certificate of the officers and directors of the company's local board at Albany, recommending the loan.

On February 9, 1892, Hill put in a written bid for a loan of \$3,000, whereby he agreed to hold sixty shares of the stock and continue payment of installments thereon until maturity, or the loan was otherwise paid, and also to pay the company a bonus of thirty shares of such stock as a consideration for the loan, and on the 16th the company advanced and loaned to Hill the sum bid for upon terms and conditions stated in the bond executed by him and wife for the repayment of the same. To secure the bond, Hill and wife made, executed, and delivered to plaintiff a mortgage upon real estate in Albany. Both the bond and mortgage were dated and executed, and the mortgage acknowledged, in Linn county, Oregon. The conditions of the bond are that Hill shall pay to the company at the office of its treasurer in the city of San Francisco, on or before seven years from date, \$3,000, and the full amount of the premium, if sixty shares have matured and become worth par, or, in case said stock has not matured, then so much of said premium as may have been earned at the time the whole of the sum advanced is repaid, together with interest thereon at the rate of six per cent

per annum from the sixteenth day of February, 1892, payable monthly; or shall pay the sum of \$36 on the second Tuesday of each month as and for the monthly dues on sixty shares, the further sum of \$15 per month as and for the monthly installments of interest on the loan at the rate of six per cent per annum, and all fines and charges that may become due on such stock until finally matured; then, and in either case, the obligation to become void, otherwise to be and remain in full force and virtue; provided, however, that, in case default is made in any payment stipulated for, the whole sum advanced, together with such proportion of the premium as has been earned, shall, at the election of the company, without notice, become due and payable, and the whole, less the withdrawal value of the sixty shares of capital stock, may be enforced and recovered, together with the accrued interest, fines, and charges. There is a further provision that the whole of the premium shall be deemed earned, due, and payable whenever the sixty shares of stock shall have matured, and one-seventh of such premium shall be deemed earned each year, or fraction thereof, elapsing after the date of the bond.

This suit was instituted October 9, 1899, to foreclose the mortgage. The complaint sets out the facts hereinbefore stated, and further alleges that the monthly payments on the sixty shares of stock, from and inclusive of the second Tuesday of November, 1891, to the second Tuesday of August, 1899, amount to \$3,348, of which \$3,132 has been paid, leaving due from defendants to plaintiff \$216, as and for the monthly dues on sixty shares of stock; that of the said \$3,132 paid, \$1,566 was paid to plaintiff in accordance with the bid for the loan, and, with the knowledge and consent of the defendants, applied to the payment of the monthly dues on the thirty shares of stock so bid as a premium, and \$1,566 to the payment of the monthly dues of the said thirty shares of stock so pledged with plaintiff for the payment of said loan; that the monthly installments of interest on said loan at the rate of six per cent per annum up to the second Tuesday of August, 1899, amount to \$1,350, of which sum \$1,260 has been paid, leaving due the sum of \$90 on monthly installments of interest on the loan; that the said thirty shares of stock pledged for the payment of such loan are not fully paid in, nor have they become worth par, or any greater sum than \$82.50 per share. The prayer is for a decree awarding to plaintiff the sum of \$3,306, less \$2,475, the present value of the shares pledged, and attorney's fees and costs. There

was a demurrer to the complaint, which resulted in a dismissal of the suit, and plaintiff appeals.

G. W. Allen and George W. Wright, for the appellant.

Weatherford & Wyatt, Hewitt & Sox, and Cannon & Newport, for the respondent.

290 WOLVERTON, J. 1. It will be noted that these transactions of which the complaint speaks were had, and the loan consummated, before the passage of the act of 1895, regulating the incorporation and business of building and loan and savings and loan associations doing a general business, and it is claimed that the loan was lawfully negotiated, although the company had not at the time executed and acknowledged a power of attorney, appointing a citizen and resident of the state as its attorney, with authority to accept, and upon whom lawful service may be made of, writs and process necessary to give jurisdiction of the incorporation to any of the courts of the state, as prescribed by Hill's Annotated Laws, sections 3276, 3277. To overcome this position it is maintained, upon the other side, that the plaintiff is a banking concern. We do not think enough appears by the record by which it can be so classified. It is, rather, to be denominated a loan company or association, and not such an institution as comes within the purview of the statute cited: *Singer Mfg. Co. v. Graham*, 8 Or. 17, 34 Am. Rep. 572; *Commercial Bank v. Sherman*, 28 Or. 573, 52 Am. St. Rep. 811, 43 Pac. 658; *Oregon etc. Invest. Co. v. Rathburn*, 5 Saw. 32, Fed. Cas. No. 10,555. It was, therefore, lawful, without the observance of the conditions there prescribed, for it to do or transact business in this state. It must be conceded that it is beyond the power of the legislature, by retrospective act, to impair in any degree the obligations of a contract; nor are we advised of any provision of the act of 1895 that impinges upon this principle. Apparently, the act was drafted **291** with a view to avoid such a contingency, as witness the declarations of section 7 relating to usury.

2. Plaintiff insists that it is a legitimate building and loan or savings and loan association, organized and operating under the special plan or system that characterizes those peculiar organizations or associations. But, to show that it is not, we will advert to one feature of its plan of operation. It requires a bidding to fix the amount of the premium, which, no doubt, is legitimate. But it exacts of the purchaser of the loan, or the

borrower, that he bid a certain amount of his stock (in this case, fifty per cent), which is to be assigned to the company, and henceforth to become its property, the borrower being required, notwithstanding, to pay the monthly dues or premium upon the assigned stock until it is matured, which must, from the nature of the obligation, be to the time of the maturity of his own stock, when the loan is extinguished—that is, the full time the loan remains unpaid in any part. Note its present operation. Defendant assigned to plaintiff thirty of his sixty shares of capital stock absolutely, as a premium bid in consideration of obtaining the loan of \$3,000, and pledged the balance of thirty shares as security for its payment. He was required to pay sixty cents per month denominated “dues” to the company, not only upon the thirty shares pledged, but also upon the thirty assigned to the company absolutely, being \$36 per month; but only one-half, or \$18 per month, went to the reduction or the extinguishment of his loan, or was available to him for the accumulation of profits in the concern, the other half being a sheer contribution to the company. Aside from this, defendant was required to pay six per cent on the amount of the loan, or \$15 per month, as interest. The result is that defendant was paying to the company \$18 per month, aside from the \$15 called interest—that is, \$33 per month, or 13.20 per cent for the use of the \$3,000 advanced; so that ultimately the defendant paid in monthly installments toward said loan, during the time from November, 1891, to August, 1899, the sum of \$4,392, and yet plaintiff insists that the obligation is not discharged by \$831, leaving nearly a third ²⁹² of it for which a decree is demanded. The scheme is a vicious one, and foreign to the operations of a legitimate building and loan or savings and loan association, and falls within the denunciation of this court: *Washington Invest. Assn. v. Stanley*, 38 Or. 319, 84 Am. St. Rep. 793, 63 Pac. 489; *Western Sav. Co. v. Houston*, 38 Or. 377, 84 Am. St. Rep. 808, note, 65 Pac. 611; 14 Am. & Eng. Corp. Cas., N. S., 710. The pretended measure adopted for the bidding of a premium, and the regulation for the payment of dues on the stock assigned to the company therefor, is a subtle method for collecting interest by another name, and constitutes a shift or device for the cover of usury. This renders the transaction a loan merely, and the payments made, under whatsoever denomination, should go to its extinguishment, along with the interest reserved, under the holding in *Western Sav. Co. v. Houston*, 38 Or. 377, 84 Am. St. Rep. 808, note, 65 Pac. 611; 14 Am. & Eng. Am. St. Rep., Vol. 91—31

Corp. Cas., N. S., 710. These payments are more than sufficient to discharge the same in full, unless it be true, as contended by plaintiff, that, the contract being for money payable in the state of California, it is solvable by the laws of that state, where parties are permitted to contract for any rate of interest they may desire.

3. It is sound doctrine, no doubt, that a contract for the payment of money entered into bona fide in one place, and made payable in another, is to be construed, governed, and enforced according to the laws of the state or country where payable. But it is without application where there is a purpose manifest to avoid the laws of usury. Mr. Chief Justice Taney, in a discussion of the subject, in *Andrews v. Pond*, 13 Pet. 65, 78, says: "The general principle in relation to contracts made in one place, to be executed in another, is well settled. They are to be governed by the law of the place of performance; and if the interest allowed by the laws of the place of performance is higher than that permitted at the place of contract, the parties may stipulate for the higher interest, without incurring the penalties of usury; but," continues the eminent jurist in another paragraph, "the same ²⁹³ rule cannot be applied to contracts forbidden by its [the place of contract] laws, and designed to evade them. In such cases, the legal consequences of such an agreement must be decided by the law of the place where the contract was made. If void there, it is void everywhere." So in *Miller v. Tiffany*, 1 Wall. 298, 310, Mr. Justice Swayne, after stating the general rule and observing that the converse is also true, says: "These rules are subject to the qualification that the parties acted in good faith, and that the form of the transaction is not adopted to disguise its real character. The validity of the contract is determined by the law of the place where it is entered into." And in *De Wolf v. Johnson*, 10 Wheat. 367, it was held that the *lex loci contractus* must govern in a question of usury: See, also, *Holmes v. Manning* (Mass.), 19 N. E. 25. Usury is a moral taint wherever it exists, and no subterfuge should be permitted to conceal it from the eyes of the law. This, it is said, is the substance of all the cases. As a principle of international jurisprudence, no state is bound or ought to enforce or hold valid in its courts of justice any contract which is injurious to its public rights, offends its morals, contravenes its policy, or violates a public law: *Dickinson v. Edwards*, 77 N. Y. 573, 576, 33 Am. Rep. 671; 2 Kent's Commentaries, 458; *Varnum v. Camp*, 13 N. J. J. 326, 25 Am. Dec. 476. It is

scarcely controverted that plaintiff was doing business in this state. Indeed, the fact is apparent from the minutes of plaintiff's board of directors, set out in the complaint, showing that loans were negotiated with persons resident within the state other than the defendant. Besides, plaintiff had a local advisory board, composed of its stockholders and members, and an agent in Albany, so that beyond question it was transacting business here, and was subject to the observance of the public laws and policy of the state, as much as any citizen thereof. Certainly, international or interstate comity does not go so far as to require the enforcement of a contract in favor of a non-resident doing business here that the courts of the state would not enforce in favor of one of its own citizens.

²⁹⁴ Now, we have seen that the plaintiff, although pretending to be operating as a building and loan association, had adopted a plan or scheme not in accord with the true principles and purposes of that character of associations, with the manifest design of collecting interest by another name, and by deception to induce the payment of an unusual and unlawful rate. It is also manifest that the defendant Hill applied to become a member of the company, not that he especially desired to be a member and stockholder thereof, but solely for the purpose of obtaining a loan under the conditions offered. So it is perfectly reasonable and altogether natural to conclude that the stipulation for payment in San Francisco was introduced into the contract to avoid the usury laws of this state. A contract of the kind consummated with such a purpose is an evasion of our laws, and contrary to the declared policy of the state, and cannot receive the sanction of this court. But, aside from this, there is very little to distinguish the case from that of *Washington Investment Assn. v. Stanley*, 38 Or. 319, 84 Am. St. Rep. 793, 63 Pac. 489. There the association had conformed to the act of 1895, and appointed a resident attorney, become duly licensed to contract business in the state, and had a solicitor residing where the loan was negotiated. In the present case, the plaintiff was transacting business here, as it had a right to do, but it had an agent and local board here composed of its resident members, appointed under the by-laws and usages of the association, whose functions it was to promote the membership thereof, and approve its loans. The bond and mortgage were executed by citizens of the state, realty situated within the state was hypothecated as security, and the money used in business here; so we must conclude that, notwithstanding the express

stipulation that the bond was payable in San Francisco, the contract is solvable by the laws of this jurisdiction. We have not overlooked the cases of *Bedford v. Eastern Bldg. etc. Assn.*, 181 U. S. 227, 21 Sup. Ct. Rep. 597, and *Dygert v. Vermont etc. Co.*, 94 Fed. 913, but in each of these cases the bona fides of the transaction seems to have been unquestioned, and the point of controversy was resolved ²⁹⁵ to the general proposition that a contract made in one state, which by its terms is payable in another, is to be controlled by the laws of the state where payable.

These considerations affirm the decree of the court below, and it is so ordered.

The Principal Case was followed in *Hicinbothorn v. Interstate Sav. etc. Assn.*, 40 Or. 511, 69 Pac. 1018. There the defendant, a Minnesota corporation, had loaned money to a citizen of Oregon, and taken a mortgage on land in the latter state. The action was brought to cancel the mortgage on the ground that it had been paid. The contract was conceded to be usurious under the laws of Oregon.

"The position of the defendant is, however, that the contract should be construed according to the laws of Minnesota, where it is valid, and not according to the laws of this state. There is some diversity of opinion whether a contract of a foreign building and loan association, such as the one now under consideration, that is not usurious under the laws of the state where the corporation is organized and domiciled, and where the obligation is made payable, can be attacked for usury in the courts of the state of the borrower's residence, where the contract was actually made, and the mortgaged premises are situated; but, by the great weight of authority, the validity of such a contract is solvable by the law of the place where it was made, and not where payable. . . . The case now under consideration cannot be distinguished on principle from *Pacific etc. Bldg. Co. v. Hill*, 40 Or. 280, ante, p. 477, 67 Pac. 103, the contracts in both being made before the passage of the act of 1895 (Laws 1895, p. 103) regulating the business of building and loan associations. The fact that the plaintiff in the *Hill* case had made loans to other citizens of Oregon, had a local advisory board composed of citizens of the state, and exacted from borrowers a bid of fifty per cent of their stock, to be assigned to the company, does not differentiate it from the present case. Such circumstances only went to show, and were alluded to by the court as evidence, that the company was in reality doing business in Oregon, and that the agreement between it and *Hill* was not an isolated instance of a nonresident making a contract with a citizen of this state, to be performed elsewhere. So, too, here, while the defendant did not have a local advisory board, and it does not appear that it had in fact made loans to other persons, it is averred that it had a resident agent here, with authority 'to take applications for loans, and forward them to the home office,' and, although it was stipulated that all payments on stock, premiums, and interest were due and payable at the home office, it did, 'for the convenience of its members,' send, 'for collection, to the local bank or treasurer, the monthly installment receipts.' In short, it was doing, or offering to do, a general loan and savings business in the state, of like character with that of the plaintiff in the *Hill* case."

For other recent cases involving the question of usury decided in the principal case, see *People's Bldg. etc. Assn. v. Berlin*, 201 Pa. St. 1, 50 Atl. 308, 88 Am. St. Rep. 764, and cases cited in the cross-reference note thereto: *National etc. Loan Assn. v. Brahan (Misa)*, 31 South. 840.

SALEM v. ANSON.

[40 Or. 339, 67 Pac. 190.]

BOND to Comply With Franchise—Power to Exact.—Under a charter authorizing a city to grant the use of its streets to those desiring to furnish it with light, a bond may be exacted from the grantee of such privilege conditioned for the completion of his plant within a specified time. (pp. 487, 488.)

BOND to Comply with Franchise—Liquidated Damages.—If a city grants the use of its streets to one proposing to construct an electric light plant, and exacts a bond from him conditioned for the completion of the plant within a certain time, the sum therein specified is liquidated damages, and recoverable without proof of actual damages. (pp. 491, 492.)

Action on a bond executed by F. R. Anson, as principal, and the Fidelity and Deposit Company of Maryland as surety. On May 17, 1900, upon the application of Anson, the common council of the city of Salem passed an ordinance granting to him the right to establish and maintain an electric light plant within the city and use its streets, alleys, and highways therefor. Anson, under the terms of the ordinance, was to have the plant so far completed by the first day of April, 1901, as to be ready to serve private consumers, and, in default thereof, was to forfeit the rights and privileges so granted. After the plant should be installed and in operation, he was to pay to the city monthly two per cent of the gross income therefrom. The city reserved the right of purchasing and acquiring the entire plant at any time, at the actual cost thereof. By section 8 of the ordinance, Anson was required to file with the recorder of the city, within thirty days from its approval, "a bond in the sum of five thousand (5,000) dollars, lawful money of the United States, with two or more sureties, or a surety or guaranty company, to be approved by the mayor, conditioned that he or they will install the electric plant authorized by this ordinance on or before the first day of April, A. D. 1901, which said plant shall have a maximum capacity of at least one hundred horse-power, and that such plant shall be in actual operation on such date."

Anson failed to construct the plant, or any part thereof, as required by the ordinance, and this action was brought against him and his surety to recover five thousand dollars, the amount specified in the bond. The complaint sets out the bond and ordinance in full, but does not allege that the city was in any way damaged by Anson's default. The court sustained a demurrer to the complaint and, the plaintiff not pleading further, entered judgment against it, from which it appeals.

W. H. and Webster Holmes, for the appellant.

Ramsey & Bingham, for the respondent.

³⁴² BEAN, C. J. 1. The first question is as to the right of the city to take and receive the bond upon which this action was brought. The charter of Salem declares that the common council shall have exclusive power to "contract for water and lights for city purposes, or to lease, purchase, or construct a plant or plants for water or lights, or both, for city purposes, in or outside the city limits; provided, that the council, upon making a careful and accurate estimate of building or purchasing and running such plant or plants, finds that the same may be constructed or purchased and run at a much less expense to the city than can be contracted for with private parties. The expense for building or purchasing such plant or plants cannot be entered into except by two-thirds vote of all the legal voters voting at any general election, or at a special election called by the council for such purpose, by a two-thirds vote to incur such expense, the council may enter into a contract; provided, that the council may grant and allow the use of streets and alleys of the city to any person, company or corporation who may desire to establish works for supplying the city and inhabitants thereof with such water or light upon such terms and conditions as the council may prescribe" (Laws 1899, p. 924, sec. 6, subd. 6); and "to allow and regulate the erection and maintenance of poles or poles and wires for telegraph, . . . electric light or other purposes, . . . upon or over the streets, alleys or public grounds of the city; to permit and regulate the use of the streets, alleys and public grounds of the city for laying down and repairing gas and water mains, ³⁴³ for building and repairing sewers, and the erection of gas or other lights; to preserve the streets, alleys, side and cross walks, bridges, and public grounds from

injury, and prevent the unlawful use of the same, and to regulate their use": Laws 1899, p. 927, sec. 6, subd. 26. The legislature has thus delegated to the city the power of regulating and controlling the use of the streets by light and water companies, and vested it with exclusive authority to grant to such companies the privilege of so using them, upon such terms and conditions as the council may prescribe. The paramount authority over streets and highways is vested in the legislature as the representative of the entire people. It may, however, delegate to municipal corporations such a measure of its power as it may deem expedient, and the local authorities, by virtue of such delegation, can enact ordinances and local laws, which have, within their jurisdiction, the force of the general statutes of the state: Tiedeman on Municipal Corporations, sec. 289.

The granting of authority to public service companies to use the streets and highways is a legislative act, entirely beyond the control of the judicial power, so long as it is within proper constitutional limitations. It may be exercised directly by the legislature, or be delegated by that body to a municipal corporation; and, when so delegated, the municipality has, within the authority granted, the same rights and powers that the legislature itself possesses. To that extent it is endowed with legislative sovereignty, the exercise of which has no limit, so long as it is within the objects and trusts for which the power was conferred. It is admitted that the legislature may, by virtue of its paramount authority, require bonds or undertakings of the grantees of such privileges, conditioned that they will construct their works within a specified time, or that they will otherwise comply with the terms of their grant, and a municipal corporation to which the exclusive power over the subject has been delegated may exercise the same right. There is no express provision in the charter of Salem authorizing the council, upon granting the privileges to use the streets, to require that the work shall be done within a specified time; ³⁴⁴ nor is it necessary. It is given the exclusive power to make the grant "upon such terms and conditions" as it may prescribe, which necessarily authorizes it to impose such reasonable conditions precedent or subsequent to the granting or exercise of the franchise as may be deemed necessary or proper, including a requirement that the grantee shall give a bond, conditioned as the one in suit: *City of Indianola v. Gulf etc.*

Ry. Co., 56 Tex. 594. In *City of Aberdeen v. Honey*, 8 Wash. 251, 35 Pac. 1097, the power of the municipality was limited by the terms of its charter, and the court held that, by reason of such limitation, it did not have the authority to exact a bond from the grantee of a franchise for a street railway. Hence that case is not authority here. We are of the opinion, therefore, that the bond in suit was valid, and within the power of the city to require and accept.

2. The remaining question is as to whether the sum specified in the bond is to be regarded as a penalty, or as liquidated damages. It is often difficult to determine whether a sum stipulated in a contract to be paid on breach thereof shall be considered as liquidated damages or as a penalty, and there is a wide divergence of opinion in the adjudged cases on the subject. The object is, of course, to ascertain the intention of the parties, as nearly as possible, and to enforce the contract according to their agreement. In doing this, the courts are not governed altogether by the language of the contract or by the term employed to designate the sum to be paid. "If it is liquidated damages, they will enforce it, though erroneously called a 'penalty,' and, on the other hand, if it is in the nature of a penalty, they will not allow it to be enforced, although the parties have expressly stated that it is to be paid as 'liquidated damages,' and not as a 'penalty'": Clark on Contracts, 599. See, also, 53 Cent. L. J. 183; 19 Am. & Eng. Ency. of Law, 2d ed., 400; *Kemp v. Knickerbocker Ice Co.*, 69 N. Y. 45; *Foley v. McKeegan*, 4 Iowa, 1, 66 Am. Dec. 107. For the construction of such contracts, as between private parties, certain arbitrary rules have been laid down, which, although not necessarily controlling in all cases, are regarded as affording a ³⁴⁵ general guide by which controversies relating thereto may be determined. Among these are: 1. Where the contract is conditioned for the performance of some collateral agreement, the sum mentioned therein will be presumed to be a penalty, and it is incumbent upon the party desiring to recover the sum named as liquidated damages to show that it was so intended by the contracting parties: *O'Keefe v. Dyer*, 20 Mont. 477, 52 Pac. 196; *Davis v. Gillet*, 52 N. H. 126; *Dill v. Lawrence*, 109 Ind. 564, 10 N. E. 573; and 2. When the actual damages in case of a breach of the contract must necessarily be speculative, uncertain, and incapable of definite ascertainment, the stipulated sum will be regarded as liquidated dam-

ages, and may be recovered as such without proof of actual damages, unless the language of the contract shows, or the circumstances under which it was made indicate, a contrary intention of the parties, or it so manifestly exceeds the actual injury suffered as to be unconscionable: 19 Am. & Eng. Ency. of Law, 2d ed., 402; Clark on Contracts, 600; 1 Sutherland on Damages, 2d ed., sec. 283; Commonwealth v. Ginn, 23 Ky. Law Rep. 521, 63 S. W. 467; Malone v. City of Philadelphia, 147 Pa. St. 416, 23 Atl. 628; Emery v. Boyle, 200 Pa. St. 249, 49 Atl. 779; Taylor v. Times Newsp. Co., 83 Minn. 523, 85 Am. St. Rep. 473, 86 N. W. 760. Where the damages are uncertain and speculative, the presumption ordinarily is that the parties have taken that into consideration in making the contract, and have agreed upon a definite sum to be paid in case of a breach, in order to put the question beyond dispute and controversy and to avoid the difficulty of proving actual damages. It would seem, therefore, that, even if the present case is to be controlled entirely by the rules applicable to controversies between private parties, there is reason for holding that the amount stipulated in the bond should be regarded as liquidated damages, and not as a penalty. The damages, if any, to the city from Anson's failure to build his plant within the specified time, were necessarily speculative and uncertain, if not absolutely incapable of proof. Indeed, it is quite doubtful whether the city could have been damaged in any way by such failure. It could gain nothing in its political or sovereign ²⁴⁶ capacity by the construction of the plant, and could lose nothing by its nonconstruction. The damages resulting from the loss of the promised share of the gross income of the proposed plant and the right of purchase are not covered by the bond, and, moreover, are so speculative, uncertain, and dependent upon so many contingencies, that they can scarcely be regarded as a subject of judicial investigation.

But whatever the rule might be as between private individuals, this action is not to be determined wholly by the principles applicable to contracts of that kind. The sum specified in the bond is somewhat in the nature of a statutory penalty for the nonperformance of a duty enjoined by law. The ordinance granting to Anson the right and privilege to use the streets and highways of the city in the construction and maintenance of his plant had the force and effect of a statute, and by his acceptance of its provisions he became bound to comply

with its terms as a statutory duty. The bond in question was given as security for the performance of such duty, and the sum specified therein is in the nature of a penalty, to be imposed as a punishment for disobeying or disregarding the provisions of the ordinance: *Maryland v. Baltimore etc. R. R. Co.*, 3 How. 534. The case of *Clark v. Barnard*, 108 U. S. 436, 2 Sup. Ct. Rep. 878, is very similar to the one in hand. The legislature of Rhode Island passed an act authorizing the Boston, Hartford and Erie Railroad Company to locate and construct a railroad through the state, but the act was not to go into effect unless the railroad company should, within ninety days from the adjournment of the legislature, deposit in the office of the treasurer its bond, with sureties satisfactory to the governor, in the sum of one hundred thousand dollars, that it would complete the road before the first day of January, 1872. In compliance with this statute, the railroad company made, executed, and filed in the office of the treasurer an ordinary penal bond in the sum stated, conditioned as in the act required. It failed to build the road, and, in a suit to enjoin the treasurer from receiving or collecting the sum specified in the bond, it was contended, as here, that the obligation required by the statute ³⁴⁷ and given by the company was an ordinary penal bond, upon which no recovery could be had except for the damages the state actually sustained from the breach of its conditions, and, it being admitted that no damages had resulted, the money arising from the payment of a certificate of indebtedness pledged in lieu of sureties on the bond reverted to the plaintiff. This position was sustained by the trial court, but on appeal the decree was reversed, and it was held that the state was entitled to collect the full amount of the bond, notwithstanding it was admitted that it had not been damaged by the breach thereof. The judgment is based upon two principal considerations: 1. That it was not, and could not have been, intended by the parties that the bond was a mere indemnifying bond; and 2. That the sum mentioned therein was imposed by the state as a statutory penalty for the nonperformance of a statutory duty.

After pointing out that no damage could possibly have arisen to the state in its sovereign or political capacity by the failure of the railroad company to construct its road as provided in this statute, Mr. Justice Matthews, speaking for the court, said: "The question of damages and compensation was

not, because it could not have been, in contemplation of the parties. There was no room for supposing that there could be any. To assume that the statute required this bond and security in this sense, in full view of the legal conclusion which it is said necessarily flows from its form, and that in the event contemplated, of the failure to build the road, all that remained to be done was that the state should hand back canceled the obligation and security it had been at such pains to exact, is to put upon the transaction an interpretation altogether inadmissible. It would have been, upon such an assumption, a vain and senseless thing, and, however private persons may be sometimes supposed to act improvidently, we are not to put such constructions, when it is legally possible to avoid them, upon the deliberate and solemn acts and transactions of a sovereign power, acting through the forms of legislation. The conclusion, in our opinion, cannot be resisted that the intention ³⁴⁸ of the parties in the transaction in question was that, if the railroad should not be built within the time limited, the corporation should pay to the state, absolutely and for its own use, the sum named in the bond and secured by the deposited certificate of indebtedness. The supposition is not open that the penalty was prescribed merely in terrorem, to secure punctuality in performance, with the reserved intention of permitting subsequent performance to condone the default, for a distinct section of the statute . . . declares that, in cases of failure to complete the road within the time limited, the act itself should be void and of no effect." In *Nilson v. Town of Jonesboro*, 57 Ark. 168, 20 S. W. 1093, the city granted to Nilson the right to construct a street railway over and through the streets of the city, and took from him a bond, in the sum of five hundred dollars, conditioned for the faithful performance by him of the provisions of the ordinance. In an action to recover on the bond because of his failure to construct the railway within the time specified, the single question presented was whether the sum mentioned in the bond should be treated as a penalty or as liquidated damages, and, after a careful examination of the authorities, it was held that plaintiff was entitled to recover the amount specified, without proof of actual damages, and notwithstanding it appeared that the damages were in fact capable of assessment. In *City of Indianola v. Gulf etc. Ry. Co.*, 56 Tex. 594, the city of Indianola granted a railway company the right to construct its road through one

of the streets of the city, on the condition that it should extend it to a point sixty-five miles distant within a certain definite time, and exacted a bond in the sum of fifty thousand dollars, conditioned for the faithful performance of the grant on its part. The company failed to construct the road, and in a suit on the bond it was held that the sum stated therein was stipulated damages, and that the city could recover the full amount thereof without proof of actual damages. It is true that in that case, as also in *Nilson v. Town of Jonesboro*, 57 Ark. 168, 20 S. W. 1093, the term "liquidated damages" was used in the contract. But the decisions did not turn upon ²⁴⁹ that fact, but were principally controlled by the consideration that no accurate computation of the real damages could be made.

Within the doctrine of these cases—and they seem to be sound—the demurrer to the complaint should have been overruled. The judgment of the court below must, therefore, be reversed, and the cause remanded for such further proceedings as may be proper, not inconsistent with this opinion.

If Damages are Uncertain and insusceptible of ready ascertainment, and the sum fixed as damages is not unreasonable, it ordinarily will be treated as liquidated damages; but if the damages are certain and susceptible of ready ascertainment, or if the sum fixed is out of proportion to the probable damages, it will be treated as a penalty: See the monographic note to *Williams v. Vance*, 30 Am. Rep. 28; *Taylor v. Times Newspaper Co.*, 83 Minn. 523, 86 N. W. 760, 85 Am. St. Rep. 473, and cases cited in the cross-reference note thereto.

FELLER v. GATES.

[40 Or. 543, 67 Pac. 416.]

OFFICIAL BONDS—Acts in Private Capacity.—A constable, who receives money from a judgment debtor to stay execution and give time to perfect an appeal, acts in his private character. His sureties, therefore, are not liable for a conversion of the money. (p. 496.)

Action by Francis Feller against John H. Gates and the sureties on his official bond for money alleged to have been received by him in virtue of his office as constable and con-

verted to his own use. It appears that Angie L. Feller recovered a judgment in the justice's court against the plaintiff herein for one hundred and sixteen dollars and forty cents, and an execution thereon was delivered to Gates. In pursuance of the writ, Gates threatened to collect the sum from the plaintiff. In order to stay the execution and gain time to take an appeal from the judgment, the plaintiff paid Gates the sum demanded and also ten dollars claimed as costs. Gates gave this receipt therefor:

"Received of Francis Feller one hundred and twenty-six dollars and forty cents cash in lieu of an undertaking on appeal in the above-entitled court and cause, and to stay execution in judgment against defendants above named until said cause is fully determined upon appeal in the circuit court of Marion county. It being understood that said money is not to be applied upon or toward the payment of said judgment, and that said money will be returned to Francis Feller upon his filing with the justice of the above-named court a sufficient undertaking, and making service of notice of appeal on plaintiff in said cause within the statutory time."

It is alleged that, in accordance with the above conditions of the receipt, the plaintiff prosecuted an appeal to the circuit court, where the judgment was reversed; and that, demand being made on Gates to pay over the one hundred and twenty-six dollars, he refused to comply. A demurrer to the complaint was sustained, and, the plaintiff refusing to plead further, the action was dismissed, and he appeals.

Carson & Adams, for the appellant.

J. C. Johnson, F. G. Eby, H. J. Biggs, and Grant Corby, for the appellant.

545 MOORE, J. It is contended by plaintiff's counsel that Gates received said sum of one hundred and twenty-six dollars and forty cents in his official capacity as constable, and, not having repaid it upon plaintiff's demand, the sureties on his official undertaking are liable for his conversion thereof, and hence the court erred in sustaining the demurrer to the complaint and in dismissing the action. "The sureties of a sheriff or constable," says Mr. Brandt in his work on Suretyship and Guaranty, second edition, section 566, "are liable for his acts in seizing property which are done *virtute officii*, but whether or

not they are liable for his acts done *colore officii* is a matter concerning which there is great conflict of authority." In *People v. Schuyler*, 4 N. Y. 173, Mr. Justice Pratt, in defining these terms, and explaining when the sureties are liable ⁵⁴⁶ for, and when exempt from, the consequences of the acts of the chief executive and administrative officer of a county, says: "The authorities recognize a principle or rule by which the acts of the sheriff, for which his sureties may be held liable, can be distinguished from those acts for which they will not be held liable. The former are termed 'acts done *virtute officii*,' and the latter, '*colore officii*.' The distinction is this: Acts done *virtute officii* are where they are within the authority of the officer, but in doing it he exercises that authority improperly, or abuses the confidence which the law reposes in him, whilst acts done *colore officii* are where they are of such a nature that his office gives him no authority to do them." The allegation of the complaint is to the effect that Gates, by virtue of his office as constable, and in pursuance of the command of the execution which had been delivered to him, threatened to collect from plaintiff herein the sum named in the writ. If this averment were not qualified by the receipt, which is made a part of the complaint, it would undoubtedly show a collection in pursuance of the execution, and by virtue of his office as constable, thereby rendering the complaint unassailable on demurrer. The receipt shows that Gates did not intend to apply the money specified therein to the satisfaction of the judgment against the plaintiff, but that its acceptance was to enable the latter to take an appeal—a proceeding in which a constable has no right to intermeddle, and in which he was powerless to stay the enforcement of the judgment, which could only have been secured by giving an undertaking conditioned that the appellant would satisfy any judgment that might be given against him in the appellate court on appeal, and upon the filing of such undertaking the justice rendering the judgment would have recalled the execution: *Laws 1899*, p. 109, secs. 42-44. It was incumbent, therefore, upon Gates to execute the command of the writ delivered to him, and, if necessary, to levy upon and sell the personal property of the judgment debtors, so that he might make the sum demanded, on or before the return day, for the benefit of the judgment creditor, whose agent he was for that ⁵⁴⁷ purpose: *Freeman on Executions*, 2d ed., sec. 283. Instead of discharging the obligation imposed upon him by law, he

agreed to repay to plaintiff herein the money so received, when an appeal from the judgment should be taken and perfected; thus manifestly stipulating to violate his trust. The promise of the constable to repay the money upon the performance of the stipulated condition necessarily shows that it was not received even under color of office; for, to render the payment a collection *colore officii*, the party making it must part with the title to the money, relying upon the right of the officer to receive it in trust for the adverse party. The receipt conclusively shows that the plaintiff herein did not intend to part with the title to the money, or expect the constable would pay any part of it to the judgment creditor, so that Gates received it in his private character, in trust for plaintiff, and not by virtue or even color of his office.

It remains to be seen if the sureties on his official undertaking are liable for the acts of their principal on account of money so received. In *Governor v. Perrine*, 23 Ala. 807, it was held that when a sheriff has taken property under attachment, which he afterward sells by agreement between the plaintiff and defendant in attachment, without an order of court, his sureties are not liable on their bond for his failure to pay over the money. Mr. Justice Gibbons, speaking for the court in deciding the case, says: "The sale of the goods having taken place without any order of court, or authority to the sheriff to make the sale, but being made by the consent of the parties in the attachment suit, it could not be said to be an official act of the sheriff, but rather that of a private individual as the agent of the parties to the suit. The securities of the sheriff are only liable for his defaults while acting in his official capacity; and that has been defined to be action in obedience to legal process in his hands." In *Schloss v. White*, 16 Cal. 65, the plaintiff and defendant, a sheriff, entered into an agreement in respect to the sale of attached property so similar to the contract evidenced by the receipt in the case at bar that we quote copiously therefrom: "It seems that plaintiff ⁵⁴⁸ sued out attachment against one Kalkmann, and had it levied on some goods. Other creditors issued similar process, also levied on the same goods. Afterward the plaintiff dismissed his proceeding, and claimed that the goods levied on, or a part of them, were his own property, they having been procured by Kalkmann by false pretenses. The plaintiff sued the sheriff in replevin. He did not take the goods out of the

sheriff's possession, but came to an arrangement with the sheriff whereby the sheriff agreed to sell the goods, and keep the proceeds to answer the judgment, if the plaintiff obtained one in his replevin suit. The sheriff sold the goods and paid the money into court, saying nothing about this arrangement; and the money was paid, under the order of the court, on the claim of the other creditors. The sureties of the sheriff had nothing to do with, and gave no sanction to, this arrangement. The question is, Are they bound to the plaintiff for the goods or the money received from the sale, the plaintiff having obtained judgment in the replevin suit? We think they are not. It was no part of the sheriff's duty to make this agreement with the plaintiff to sell the goods, and to hold the proceeds for the plaintiff in a certain event. He had no legal authority, as sheriff, to sell these goods, and to hold the money on bailment for the plaintiff. If the plaintiff trusted him with the custody of the goods, and gave him authority to sell them, he became, so far, the agent of the plaintiff, and the plaintiff must look to him merely as his agent. He cannot hold the sureties bound for executory contracts of this sort, entered into without their consent. If so, there would be scarcely a limit to their responsibility; for contracts of this sort might run for years, and represent every variety of complication. If the sheriff had retained the goods, he might have obtained a bond of indemnity from the other creditors; or, if the plaintiff had given bond, he might have relieved the sheriff from the custody of the goods. But here the sheriff assumes, by this agency, a responsibility for himself and his sureties greater in degree and different in kind from that imposed by law, and it would be unjust and impolitic to encourage ⁵⁴⁹ such dealings by holding sureties responsible for them. It would be against law so to hold; for the sureties are entitled to stand upon the precise terms of their contract, by which they stipulated in this case for the official, not the personal, dealings of their principal."

In the case at bar the contract entered into between the plaintiff and the constable was private in character, and presumably for their mutual benefit; and as the sureties may properly invoke the rule of *strictissimi juris* (*Murfree on Sheriffs*, sec. 82), thereby rendering them liable only for official acts (*Hill v. Kemble*, 9 Cal. 71; *State v. Mann*, 21 Wis. *694), it follows that the judgment is affirmed.

**ACTS FOR WHICH SURETIES ON OFFICIAL BONDS ARE
LIABLE.*****I. Scope of Note.****II. General Principles.****a. Obligation of Sureties to be Strictly Construed.**

1. General Rule.
2. Construction to be Reasonable, Though Strict.
3. Principal and Sureties Bound to Same Extent on Bond.

b. Liability for Performance of Duties Imposed Upon Principle Subsequent to Execution of Bond.

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 - A. In General.
 - B. Under Statute Making Bond Cover Subsequently Imposed Duties.
2. Where New Duties are Germane to Old.
 - A. General Rule.
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 - (1) Treasurers.
 - (2) Sheriff's Constables, etc.
 - (3) Tax Collectors.
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1. Liability of Sureties on General Bond.
 - A. General Rule.
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 - (1) Sheriff as Tax Collector.
 - (2) County Treasurer as School Treasurer.
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2. Liability of Sureties on Special Bond.**d. Liable for Official Acts Only.**

1. General Rule.
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***REFERENCES TO MONOGRAPHIC NOTES.**

When act of incumbent of office is to be regarded as an official act and when not: 46 Am. St. Rep. 130-133.

Liability of sureties on successive bonds: 10 Am. St. Rep. 843-860.

Liability of sureties of sheriff for personal injury inflicted by officer: 71 Am. St. Rep. 519-522.

Whether and when the sureties on an official bond may escape liability on the ground that their principal was a trespasser: 73 Am. St. Rep. 420-425.

Liability of sureties of notaries: 82 Am. St. Rep. 385-388.

What constitute breaches of official bonds of sheriffs and constables: 46 Am. Dec. 509-517.

What will exonerate treasurers and other public officials from payment of money once in their custody: 67 Am. Dec. 365-373.

Official bonds when valid and when void: 82 Am. Dec. 760-764.

When an official bond becomes binding on the sureties and what irregularities shall to relieve them from liability: 90 Am. St. Rep. 177-204.

3. Distinction Between Acts Under Color and by Virtue of Office.
4. Immaterial that Object of Default is Personal Profit.
5. Nonpayment of Bills Incurred in Performing Official Duty.
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- a. Liability for Judicial Acts.
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2. Loss of Funds Without Fault.
 1. In General.
 2. Doctrine that Liability is Absolute, as of a Debtor.
 - A. In General.
 - B. Basis of Doctrine.
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 4. Doctrine that Liability is Absolute Unless Expressly Qualified.
 - A. In General.
 - B. Basis of Doctrine.
 - (1) Terms of Bond.
 - (2) Public Policy.
 - C. Loss by Robbery, Theft, etc.
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 - (1) In General.
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 - A. In General.
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 - D. Where Loss is Negligent, or After Previous Default.

- g. Liability for Interest Received on Public Funds.
 - h. Necessity of Demand of Performance.
 - i. Liability for Statutory Penalties.
 - j. Liability Where Default is from Several Funds Covered by Separate Official Bonds.
 - k. Good Faith of Officer Immaterial.
 - l. Negligence or Default of Other Officers.
 - 1. Where the Cause of Principal's Default.
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- III. Liability of Sureties on Bonds of Various Classes of Officers.**
- a. Sheriffs, Constables, etc.
 - 1. In General.
 - 2. Failure to Execute Writ.
 - A. General Rule.
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 - 3. Seizure, Arrest, etc., Without Process.
 - A. Of Property.
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 - (1) General Rule.
 - (2) Where Process Unnecessary.
 - (3) Where Bond Covers Injury to Public Only.
 - 4. Acts Under Process.
 - A. Under Process Irregular or Void.
 - (1) Seizure, etc., of Property.
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 - B. Seizure of Exempt Property.
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 - (3) Weight of Authority—Sureties Liable.
 - D. Arrest, etc., of Stranger to Writ.
 - E. In Excess of Authority Conferred by Process.
 - F. Injury to Property in Custody.
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 - 5. Proceeds of Levy, etc.
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- B. Received Under Levy of Irregular or Void Process.
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- 6. Taking Security.
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- 8. Acts in Ex-officio or Appointive Capacities.
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 - (1) Where no Separate Bond Required.
 - (2) Where Separate Bond Required.
 - B. In General—As Trustee, Treasurer, etc.
- b. Tax Collectors.
 - 1. Failure to Collect.
 - 2. Seizure of Exempt Property.
 - 3. Proceeds of Collection.
 - A. General Rule.
 - B. Immaterial that Tax was Irregularly Levied or Collected.
 - C. Defense that Tax was Unconstitutional.
 - D. Miscellaneous.
 - 4. As Ex-officio Treasurer.
- c. Treasurers.
 - 1. Failure to Render True Reports.
 - 2. Refusal to Pay Legal Warrants.
 - 3. Payment of Illegal Warrants.
 - 4. Improper Issuance of Tax Receipts, Warrants, etc.
 - 5. Misappropriation of Public Funds.
 - A. In General.
 - B. Funds Unauthorizedly Received.
 - C. Funds Improperly Raised or Collected.
 - D. Funds not Actually Received.
 - 6. Duties Imposed Subsequently to Execution of Official Bond.
 - 7. Funds Covered by Special Bond.
 - 8. Deposit of Funds in Bank.
- d. Clerical Officers—Clerks of Court, City Clerks, County Clerks, etc.
 - 1. Clerks of Court.
 - A. Issuance of Writs, etc.

- B. Issuance of Letters of Guardianship, etc.
- C. Issuance of Marriage Licenses.
- D. Ministerial Duties Generally.
- E. Approval of Bonds.
- F. Collection, etc., of Fees.
- G. Misappropriation of Funds Received by.
- 2. City Clerks, County Clerks, etc.
 - A. Misappropriation of Funds.
 - B. Issuance of Warrants.
- 3. Acts of Clerk of Court in Ex-officio or Appointive Capacities.
 - A. As License or Tax Collector.
 - B. As Recorder, etc.
 - C. Under Appointment by Court.
 - (1) In General.
 - (2) Where Separate Bond is Required.
 - (3) Where Separate Bond is not Required.
- e. Auditors.
- f. Supervisors, Trustees, etc.
- g. Public Inspectors, Superintendents, etc.
 - 1. For Injuries from Failure to Inspect, etc.
 - 2. For Money Received by.
- h. Judicial Officers.
 - 1. In General.
 - 2. Ministerial Acts.
 - A. Justice of Peace.
 - B. Probate Judge, etc.
 - 3. Judicial Acts.
 - A. General Rule.
 - B. What Deemed Judicial Acts.
 - C. Corruptly Done.
 - D. Approval of Bonds.
 - E. Without Jurisdiction.
 - 4. For Money Received by.
 - A. In General.
 - B. Where Authorizedly Received.
 - C. Where Unauthorizedly Received.
 - D. As Agent for Collection.
 - (1) General Rule.
 - (2) In Satisfaction of Judgment.
 - 5. Acts in Ex-officio or Appointive Capacity.
- i. Notaries Public.
- j. Conclusion.
 - I. Scope of Note.

In the following consideration of the acts for which sureties on official bonds are liable, the discussion will be confined to the bonds

of officers who are, strictly speaking, "public officers." Those exercising quasi public functions, such as guardians, executors, receivers, etc., will not, therefore, be considered. Moreover, so far as it may be done consistently with a full treatment of the matters covered, the inquiry into what acts constitute breaches of official bonds so as to render the bondsmen answerable will be limited to a determination of the acts which, in their nature, amount to a breach of the bond. Other considerations, for instance, such as whether the time at which the act was done was within the period covered by the undertaking of the sureties, while equally important in determining the liability of the latter, are outside the scope of this note. Likewise matters of evidence or practise, such as the binding effect on the sureties of admissions and representations by, or of judgments recovered against, their principal will be excluded from this discussion. For the liability of sureties on successive bonds, see the monographic note to *Crown v. Commonwealth*, 10 Am. St. Rep. 843; and for questions as to the validity of official bonds, or what irregularities are sufficient to avoid them, see the very recent monographic note to *Estate of Ramsay v. People*, 90 Am. St. Rep. 188-206.

In the treatment of the matters which are to be covered in this note, the general principles governing the liability of sureties on official bonds for the acts of their principals will first be considered. The application of these principles to the liability of the sureties on the bonds of any particular class of officers, and such principles as are peculiar to that class will be treated under the heading of that particular class.

II. General Principles.

a. Obligation of Sureties to be Strictly Construed.

1. General Rule.—Sureties are persons favored by the law. Their obligations are ordinarily assumed without pecuniary compensation, and are not to be extended by implication or construction. Their liability is, as it is put, *strictissimi juris*. They have a right to stand upon the terms of their obligation, and, having consented to be bound to a certain extent only, their liability must be found within the terms of that consent, strictly construed: *Morrow v. Wood*, 56 Ala. 1; *Clark v. Lamb*, 76 Ala. 406; *Heidt v. Minor*, 89 Cal. 115, 26 Pac. 627; *People v. Cobb*, 10 Colo. App. 478, 51 Pac. 523; *State v. Montague*, 34 Fla. 32, 15 South. 589; *McDonald v. Bradshaw*, 2 Ga. 248, 46 Am. Dec. 385; *Cooper v. People*, 85 Ill. 417; *Orton v. City of Lincoln*, 156 Ill. 499, 41 N. E. 159; *Weisenborn v. People*, 53 Ill. App. 32; *Fuller v. Calkins*, 22 Iowa, 801; *Schmidt v. Drouet*, 42 La. Ann. 1064, 21 Am. St. Rep. 408, 8 South. 396; *Cressey v. Gierman*, 7 Minn. 398; *State v. Conover*, 28 N. J. L. 224, 78 Am. Dec. 54; *People v. Pennock*, 60 N. Y. 421; *Prairie School Tp. v. Haselen*, 3 N. Dak. 328, 55 N. W. 938; *Lowe v. City of Guthrie*, 4 Okla. 287, 44 Pac.

198; *Brown v. Sneed*, 77 Tex. 471, 14 S. W. 248; *Territory v. Ritter*, 1 Wyo. 318; *Boelin v. Blythe*, 46 Fed. 181.

2. **Construction to be Reasonable Though Strict.**—This rule does not require that a strained construction be put upon the plain words of a bond in order that the sureties may escape liability. What is demanded is merely that the sureties are not to be bound by implication, or beyond the extent to which they have obligated themselves in the execution of the bond. "Whilst the liabilities of sureties are to be strictly construed, it is not the duty of courts to aid them to escape liability by technical and hypercritical construction": *Cawley v. People*, 95 Ill. 249.

3. **Principal and Sureties Bound to Same Extent on Bond.**—That the favor accorded sureties by the law, while it does not permit them to be bound beyond the terms of their contract, does not release them from any liability reasonably imposed by those terms, is shown by the comparative liability of the principal and his sureties on the bond. Whatever may be the extent of the liability of an officer personally or otherwise, outside of his bond, so far as his liability on the bond is concerned, it is no greater nor less than that of his sureties on the instrument. The liability of both is measured by the terms of the bond reasonably, but strictly, construed. As is said by Wright, J., in *Fuller v. Calkins*, 22 Iowa, 301: "We concede the proposition stated by appellants, that the liability of the sureties is to be measured by strict law, and that they are only liable for the failure of the principal to perform an official duty. In looking at or construing the obligation, however, we must put that construction upon it which the language employed fairly and reasonably implies. In this respect the same rules should be applied to all those who have jointly obligated themselves in the undertaking. True, the principal may be liable outside of the bond, and the sureties released. But if the instrument, by its terms, covers the defalcation charged, the sureties must be held equally with their principal." To the same effect see *Smith v. United States (Ariz.)*, 45 Pac. 341; *Gilbert v. Isham*, 16 Conn. 525; *Hutchinson v. Commonwealth*, 6 Pa. St. 124; *Wylie v. Gallagher*, 46 Pa. St. 205.

b. Liability for Performance of Duties Imposed Upon Principal Subsequent to Execution of Bond.

1. Where New Duties are not Germane to Old.

A. In General.—One of the most frequent applications of the so-called "*strictissimi juris*" rule—that the liability of sureties on official bonds is confined to the obligation in terms assumed by them—is with reference to their responsibility for their principals in the performance of duties imposed by the legislature subsequent to the execution of the bond. It is well settled that the sureties of a public official are not answerable for the defaults of their principal in the performance of duties imposed or assumed subsequent to the execution of the bond, and not of a character germane to those

required of him at the time of the execution of that instrument. If the duties subsequently imposed have no natural relation to the ordinary duties of the particular office, and are not such as naturally and ordinarily belong to that office, they cannot be said to have been within the contemplation of the sureties, when they assumed to answer for the faithful performance by the officer of his duties, and are not, therefore, within the scope of the obligation of suretyship. Thus, it has been held that the sureties of a state treasurer are not liable on the bond for his defaults as cashier of the state bank where his duties in the latter connection were imposed after the bond had been executed: *Reynolds v. Hall*, 2 Ill. 35. Nor are the sureties of an inspector of grain, whose duties at the time of the execution of the contract of suretyship covered no more than the faithful inspection of grain, responsible for his acts in the collection and care of fees and charges for inspection where the duties of caring for such funds was one subsequently prescribed: *People v. Tompkins*, 74 Ill. 482.

On the same principle it was held in *United States v. Cheeseman*, 3 Saw. 424, Fed. Cas. No. 14,790, that the obligation of the bond of an assistant treasurer of the United States, and treasurer of a branch mint, did not cover duties subsequently imposed on such an officer with reference to the sale of revenue stamps. "The duties of treasurers are usually to keep safely, and pay out upon lawful authority, the public moneys, not to act as collectors of customs, postmasters, receivers of land offices, or other officers engaged in collecting the different branches of the public revenues. Treasurers are ordinarily understood to be keepers of the public funds collected by other classes of public officers, to whom those specific duties are specifically assigned. We do not think the words of the treasurer's bond under consideration would cover the duties of collectors of customs, etc., imposed by an act of Congress, or a regulation of the treasury department, after the giving of the bond. . . . There is no natural or necessary connection of this service with the ordinary duties of that officer, as treasurer." This holding, and the language quoted were enunciated in a case in which the bond, after covering fully the duties of the treasurer in the receipt, custody and disbursement of the public funds, provided for his faithful performance of "all other duties as fiscal agent of the government which have been or may be imposed by any act of Congress, or by any regulation of the treasury department made in conformity to law." The effect of this and other cases in which sureties have been held not liable for the defaults of their principal in the performance of subsequently imposed duties (see in addition to cases already cited, *White v. City of East Saginaw*, 43 Mich. 567, 6 N. W. 86; *Brown v. Sneed*, 77 Tex. 471, 14 S. W. 248; *United States v. Cutter*, Fed. Cas. No. 14,911), is to limit the liability of the sureties in such cases to such duties as have

some natural relation to the ordinary duties imposed upon the officer giving the bond. General terms in the bond, and provisions that the bond shall cover all duties which may thereafter be imposed by law, are to be read in the light of this rule, and do not, therefore, extend the responsibility of sureties over matters in their nature unconnected with the office as it existed at the time of the execution of the bond, and which the sureties cannot reasonably be supposed to have contemplated in assuming liability. (Compare, however, *Mahaska County v. Ingalls*, 14 Iowa, 170.)

B. Under Statute Making Bond Cover Subsequently Imposed Duties.—In a number of states the statutes providing for official bonds provide that they shall cover such duties as may be required of the officer by any law passed subsequently to the execution of the bond: See *Coleman v. Ormond*, 60 Ala. 328; *Morrow v. Wood*, 56 Ala. 1. These provisions are very properly construed, as are similar clauses when they appear in the bond itself, and are held to include such subsequently imposed duties only as are germane to the duties required of the principal, at the time of the execution of the bond: *People v. Edwards*, 9 Cal. 286.

2. Where New Duties are Germane to Old.

A. General Rule.—In an Alabama case, it is said that "if the engagement of suretyship relates to a particular office, with prescribed duties, it extends only to such duties as are prescribed when the engagement is entered into, and not to such as may be subsequently attached to the office": *Morrow v. Wood*, 56 Ala. 1 (citing *Bartlett v. Attorney General*, Park. 277; *Bowdage v. Attorney General*, Park. 488); *Coleman v. Ormond*, 60 Ala. 328. The rule is, however, undoubtedly the other way, and by the great weight of authority it is well settled that the sureties of a public officer, unlike the sureties on a contract between private parties, are not discharged by every change in the duties of the principal obligor.

"A public officer," says Hunt, J., in *People v. Vilas*, 36 N. Y. 459, 93 Am. Dec. 520, "takes his office with the obligation to perform all the duties incident to or connected with it, then existing, or that may be added by the legislature, provided the nature and character of the duties remain the same. The imposition of duties of the same nature and character, or the withdrawal of portions of them pertain to the position. It is indispensable to the proper management of public affairs, and serious injury to the public interest would occur were the rule otherwise. The obligation is for a faithful performance of all the duties of the office, not of the duties as they exist at any particular moment. His duties vary with the requisitions of the statute; and whatever the statute imposes or withdraws becomes or ceases to be a part of his duty. The only limitation to this rule is that the duties imposed shall be of the same general nature and character." Founded, therefore, upon considerations of public policy, and on the theory that in becoming surety

for the faithful performance by another of his duties as a public officer, the surety must have contemplated the possibility and probable necessity of some change by the legislature in the duties imposed upon his principal, the rule uniformly recognized is that such sureties on official bonds are liable for the faithful performance by their principal of all duties imposed subsequent to the execution of the bond, which are of the same general nature and character as those already required, and are appropriate to the office.

B. Instances.

(1) **Treasurers.**—Thus it is held that the bond of a county treasurer conditioned for the faithful performance of his duties "according to law," the phrase "according to law" embraces statute law in force during the term of office, whether passed before or after the execution of the bond. The sureties on such bond are therefore liable for moneys belonging to a city or school district which have come into the hands of the county treasurer by virtue of a statute passed subsequent to the execution of the bond and giving the county treasurer the custody of city or school funds: *Dawson v. State*, 38 Ohio St. 1. And as a general rule, a statute which merely commits to the custody of a county or other treasurer a fund not previously intrusted to him, as a school fund, is not regarded as imposing a duty different in its general character from the duties already required, or inappropriate to the office. Where, therefore, the statute prescribing the new duty, either expressly or impliedly makes the sureties on the treasurer's general official bond liable for the new fund committed to his charge, they will be responsible for the faithful performance by their principal of his duties with reference to that fund: *Mahaska County v. Ingalls*, 14 Iowa, 170; *People v. Vilas*, 36 N. Y. 459, 93 Am. Dec. 520; *Board of Education v. Quick*, 99 N. Y. 138, 1 N. E. 533.

(2) **Sheriffs, Constables, etc.**—Similarly, in the case of sheriffs and constables, the execution of process is a duty covered by the general nature of the office, and the sureties on the bond of such an officer are responsible for his acts in the execution of process which a law passed subsequent to the date of the execution of the bond authorized to be directed to the sheriff: *King v. Nichols*, 16 Ohio St. 80. See, also, *Bartlett v. Prather*, 2 Bibb (Ky.), 586. Nor does a statute attaching a constable to a municipal court instead of a justice's court so materially change the nature of his office as to release his sureties from liability for his acts in the altered capacity: *Freeland v. Akers*, 5 Misc. Rep. 528, 25 N. Y. Supp. 986; *Levin v. Robie*, 5 Misc. Rep. 529, 25 N. Y. Supp. 982.

(3) **Tax Collectors.**—As applied to the liability of sureties on the bonds of collectors of taxes or customs, the rule is that the subsequent authorization of a new or special levy does not introduce duties of a nature different from those already required of the principal, and the sureties are responsible for the official acts or

omissions of the latter in the collection of such taxes: *Commonwealth v. Gabbert*, 5 Bush (Ky.), 438. See, also, *Postmaster General v. Munger*, 2 Paine, 189, Fed. Cas. No. 11,809. Nor will a mere extension of the time within which the taxes must be accounted for: *Commonwealth v. Holmes*, 25 Gratt. (Va.) 771; or a change of the law permitting the receipt of currency in payment of taxes (*Bordon v. Houston*, 2 Tex. 594), relieve the sureties from liability on the bond. So the obligation to pay storekeepers is regarded as germane to the ordinary duties of a collector of internal revenue: *United States v. McCartney*, 1 Fed. 104. Even where the new duties cannot be regarded as appropriate to the office, and, therefore, within the liability of the sureties, this does not affect their responsibility for the acts lawfully covered by the bond, but they remain liable for the faithful performance by the principal of such duties as the bond does cover: *Commonwealth v. Holmes*, 25 Gratt. (Va.) 771; *United States v. Gaussen*, 2 Woods, 92; Fed. Cas. No. 15,192, affirmed in 97 U. S. 584.

(4) *Clerks of Court*.—The sureties on the bond of a clerk of court are responsible for his acts in reference to fees, which, although he was authorized to collect at the time of the execution of the bond, he was required to collect by a subsequent statute: *State v. Ridgway*, 12 Ill. 14. So the bond covers a subsequently imposed duty of the clerk to collect sheriff's fees: *Weisenborn v. People*, 53 Ill. App. 32; or license taxes: *Wilmington v. Nutt*, 78 N. C. 177. Where a statute relating to the docketing of judgments by the clerk imposed duties not materially different from those required of him by the common law, it does not, of course, release the sureties on the official bond of the clerk from liability for the acts of the clerk in docketing the judgment: *Governor of State v. Dodd*, 81 Ill. 162. So merely adding a new animal to the list of those for whose skins a probate judge is to issue certificates under the bounty law changes the duties of such officer in degree, but not in kind, and the sureties are liable for his performance of such new duties: *Territory v. Carson*, 7 Mont. 417, 16 Pac. 569. Statutes authorizing the receipt of new funds by an officer are not, however, retroactive, and do not affect the liability of the sureties on his bond for sums when received prior to the enactment of the statute: *McKee v. Griffin*, 66 Ala. 211.

c. Where Special or Additional Bonds are Required.

1. Liability of Sureties on General Bond.

A. *General Rule*.—Another and a frequent application of the rule that the sureties on the bond of a public officer are entitled to a strict construction of their obligation occurs where, in addition to the general official bond required of the officer, he is by law compelled to give another and separate bond before entering upon certain particular duties, or duties required of him in an ex-officio capacity. Where this is required, it is quite uniformly held that the

sureties on the general official bond are not liable for the performance by the principal of those duties covered by the special bond.

B. Instances.

(1) **Sheriff as Tax Collector.**—Thus, where a sheriff as ex-officio tax collector is, in addition to his official bond as sheriff, required to execute a bond for the faithful performance of his duties as tax collector, his general official bond as sheriff does not, it is held, cover his acts as tax collector. The law requiring another bond for the performance of particular duties, these are not to be regarded as having been within the contemplation of the sureties on the general official bond as sheriff: *Cooper v. People*, 85 Ill. 417; *Governor v. Barr*, 13 N. C. 65; *Jones v. Montford*, 20 N. C. 73; *Boger v. Bradshaw*, 32 N. C. 229; *Columbia Co. v. Massie*, 31 Or. 292, 48 Pac. 694. Where, however, the bond as tax collector is not required, but the county board is authorized to demand it if necessary, it will be regarded as cumulative security merely, and the sureties on the general official bond of the sheriff will be held liable for his defaults as tax collector: *State v. Harney*, 57 Miss. 863. (See, generally, for the liability of the sureties of a sheriff for his acts as collector of taxes, post, III, a, 8, A, (1)).

(2) **County Treasurer as School Treasurer.**—The same rule applies where a separate bond is required of a treasurer for the faithful performance by him of his duties in connection with a particular fund intrusted to his custody: *State v. Young*, 23 Minn. 551; *Redwood County Commrs. v. Tower*, 28 Minn. 45, 8 N. W. 907; *Board of Commrs. of Scott County v. Ring*, 29 Minn. 398, 13 N. W. 181; *Board of Commrs. v. Knudson*, 71 Minn. 461, 74 N. W. 158; *State v. Mayes*, 54 Miss. 417; *State v. Felton*, 59 Miss. 402; *State v. Hall (Miss.)*, 8 South. 464; *State v. Johnson*, 55 Mo. 80; *State v. Batement*, 102 N. C. 52, 11 Am. St. Rep. 708, 8 S. E. 882; *Board v. City of Paris*, 66 Tex. 119, 18 S. W. 342; *Milwaukee Co. Supervisors v. Ehlers*, 45 Wis. 281. Compare *Mahaska County v. Ingalls*, 14 Iowa, 170. The sureties on the general bond may, of course, by apt words therein indicating their intention to become sureties for the conduct of the principal in respect to the fund for which the law requires a separate bond, bind themselves in the one instrument as sureties on both the general and special bond contemplated by the law: *Hall v. State*, 69 Miss. 529, 13 South. 36; *Wake County Commrs. v. Magnin*, 86 N. C. 285. (See, generally, for the liability of the sureties of a city, county or state, etc., treasurer for his acts as custodian of special funds, post, III, c, 7.)

(3) **Tax Collector in Collection of Special Levies.**—In the application of the doctrine to the general official bond of a tax collector, it is held that the sureties on such instrument are not responsible for the acts or defaults of their principal in the collection of a tax levy for which he is by law required to give a special bond: *Waters v. State*, 1 Gill (Md.), 302. In Kentucky, the same rule is recognized

and applied: *Anderson v. Thompson*, 10 Bush, 132; *Elliott v. Kitchen*, 14 Bush, 289; *Cook v. Clark*, 13 Ky. Law Rep. 100, 16 S. W. 269; but under various statutory provisions there in force it is held that the sureties on the general official bond are liable for taxes covered by a special bond required by law, where for any reason the latter bond is not executed: *Kenton Co. v. Lowe*, 91 Ky. 367, 16 S. W. 82; *Howard v. Commonwealth*, 105 Ky. 604, 49 S. W. 466; *Fidelity etc. Co. v. Commonwealth*, 104 Ky. 579, 47 S. W. 579, 49 S. W. 467; *Pulaski County v. Watson*, 21 Ky. Law Rep. 61, 50 S. W. 861; *Catron v. Commonwealth*, 21 Ky. Law Rep. 650, 52 S. W. 929; *Adair v. Hancock Dep. Bank*, 21 Ky. Law Rep. 934, 53 S. W. 295; *Indiana Bridge Co. v. Carr*, 95 Fed. 594, 37 C. C. A. 187. Where, however, the special bond is executed, the sureties on the general bond are not, it is held, liable for the taxes covered by the particular bond: *Whaley v. Commonwealth*, 23 Ky. Law Rep. 1292, 61 S. W. 35; *Lyons v. Breckinridge County Court*, 101 Ky. 715, 42 S. W. 748.

For the liabilities of the sureties of clerical officers, as clerks of court, county clerks, etc., on their general bonds for acts done in ex-officio or appointive capacities, see post, III, d, 3.

2. *Liability of Sureties on Special Bond.*—Where an officer is by law required to give several bonds each for the performance of a certain set of duties, the mere fact that the bond also contains general terms covering the faithful performance of the duties imposed upon the principal obligor does not extend the bond to take in duties provided for in another and different bond, but it is confined to such as partake of the nature of those specifically mentioned. This construction is merely the application of the rule that general terms are to be read in the light of their context, and unless the rule were followed, "the penalty to secure one set of duties might be absorbed in covering delinquencies in others": *Scott v. Kenan*, 94 N. C. 296; *Crumpler v. Governor*, 12 N. C. (1 Dev.) 52; *County Trustee v. Matlock*, 12 N. C. (1 Dev.) 214; *Hunter v. Routledge*, 51 N. C. (6 Jones) 216; *State v. Sutton*, 120 N. C. 298, 26 S. E. 920; *Eaton v. Kelly*, 72 N. C. 110; *State v. Paling*, 44 W. Va. 312, 28 S. E. 930. In one case at least, however (*Holt v. McLean*, 75 N. C. 347), the supreme court of North Carolina seems to have lost sight of the reason of the rule. In that case it was held that an official bond of a register of deeds, conditioned that he should "safely keep the records and books of his said office, and shall in all respects truly and faithfully discharge the duties of the said office," did not cover the acts of the principal in issuing a marriage license. The theory on which the court proceeded was that the general words of the bond could not enlarge the operation of the bond beyond the "keeping of the records and books of the said office." So far as appears from the report, however, no other bond was required of, or given by, the register of deeds, and the decision seems one in

which a rule originally laid down as applicable to a case where several bonds were given, each covering a particular set of duties, and which was intended to confine each bond to the particular duties covered by it, is applied to a case where but one bond was called for. What was evidently intended as a general official bond is in *Holt v. McLean*, 75 N. C. 347, restricted to a narrower scope merely because of the enumeration therein of a portion of the duties the bond was intended to cover.

d. Liable for Official Acts Only.

1. **General Rule.**—In assuming liability upon the official bond of a public officer, his sureties become answerable for the faithful performance of his duties and the propriety of his conduct as an officer. But there the liability ceases. "The sureties do not bind themselves to protect the public against every act of their principal, nor do they become his sureties to keep the peace": *State v. Conover*, 28 N. J. L. 224, 78 Am. Dec. 54. A breach of his duties as a man and a citizen may render an officer personally liable, but it does not create any liability on the part of the sureties on his official bond. The latter are responsible only for the breach of his duties as an officer—for his official acts and omissions. This is the general principle by which the liability of the bondsmen of an official is to be determined, and, stated as a general principle merely, it is so undoubted that a citation of the authorities in which it is recognized and applied could answer no practical purpose. While unanimous in their recognition of the principle, the authorities are, however, by no means harmonious in its application, and by far the larger portion of this note is concerned with the determination of what does or does not constitute an "official act" within the meaning of the rule.

2. **Statutory Exceptions.**—A statute may, of course, render the sureties on the bond of a public officer liable for certain acts of the latter, which as an officer he is not required to perform, and in the performance of which his official character plays no part. Thus, in *Williams v. Williamson*, 6 Ired. 281, 45 Am. Dec. 494, by a statute of 1818 of North Carolina, the bond of a constable in addition to covering the faithful discharge of his duty as a constable, likewise assured "his diligently endeavoring to collect claims put into his hands for collection and faithful paying over all sums thereon received, either with or without suit." As was said by the court in that case: "The act does not impose any new duties or powers on a constable, as such, but merely makes his sureties liable for his acts as agent, as he himself was before." Statutes of this nature are, however, very infrequent, and do not at all affect the force of the general and undoubted rule that the bondsmen of a public official are responsible only for his official acts or omissions.

3. **Distinction Between Acts Under Color and by Virtue of Office.** In applying the rule that sureties on official bonds are responsible

for breaches by the principal obligor of official duties only, many of the courts have recognized and sought to apply a distinction between acts done by the principal by virtue of his office (*virtute officii*), and those done under color of office (*colore officii*) merely. As commonly put, those acts are *virtute officii* which "are within the authority of the officer, but in doing which he exercises that authority improperly, or abuses the confidence which the law reposes in him; whilst acts done *colore officii* are where they are of such a nature that the office gives him no authority to do them." For the former, the sureties are said to be liable, while as to their liability for acts of the principal done *colore officii* the authorities are in conflict.

The distinction suggested has been productive of anything but harmony among the authorities, and in its attempted application to particular cases it has served to confuse rather than to clarify. It is a distinction hard to make in theory, and even more difficult to apply in practice. Not only do the courts differ as to the liability of the sureties for acts *colore officii*, but among those authorities which agree that such acts are covered by the obligation of the bond, the most widely divergent views are entertained as to what constitute acts "*colore officii*" within the meaning of the definition.

While, therefore, the cases are full of discussions concerning the distinction between acts done by virtue and those done under color of office, the distinction is "of little practicable application" (*Drolesbaugh v. Hill*, 64 Ohio St. 257, 60 N. E. 202), and the apparent conflict "exists rather in the application and use of terms than the principles enunciated": *Hawkins v. Thomas*, 3 Ind. App. 399, 29 N. E. 157. See, also, *People v. Cobb*, 10 Colo. App. 478, 51 Pac. 523; *Lewis v. State*, 65 Miss. 468, 4 South. 429. It is in the application of the general principles to particular cases that the difficulty arises, and those cases in which the conflict upon the general question of what are acts "*colore officii*," and the liability of the sureties therefor, has affected the determination of their liability for particular acts will be hereinafter considered. See, however, generally, as taking the view that sureties are not liable for the acts and omissions of the principal obligor done *colore officii*, the following cases: *Bourne v. Shapleigh*, 9 Mo. App. 64; *Huffman v. Koppelnorn*, 8 Neb. 344, 1 N. W. 243; *Ottenstein v. Alpaugh*, 9 Neb. 237, 2 N. W. 219; *State v. Conover*, 28 N. J. L. 224, 78 Am. Dec. 54; *Ex parte Reed*, 4 Hill, 572 (overruled in *People v. Schuyler*, 4 N. Y. 173); *Lowe v. City of Guthrie*, 4 Okla. 287, 44 Pac. 198; *Dysart v. Lurty*, 3 Okla. 601, 41 Pac. 724; *Taylor v. Parker*, 43 Wis. 78.

On the other hand, the preponderance of authority holds the sureties on an official bond liable where the acts were done *colore officii*: *Jefferson v. Hartley*, 81 Ga. 716, 9 S. E. 174; *State v. Walford*, 11 Ind. App. 392, 29 N. E. 162; *State v. McGill*, 15 Ind. App. 289,

43 N. E. 1016; *Jewell v. Mills*, 3 Bush (Ky.), 62; *Knowlton v. Bartlett*, 1 Pick. 271; *Lowell v. Parker*, 10 Met. 509, 43 Am. Dec. 436; *Turner v. Sisson*, 137 Mass. 191; *Lewis v. State*, 65 Miss. 468, 4 South. 429; *State v. Ryland*, 163 Mo. 280, 63 S. W. 819; *State v. Jennings*, 4 Ohio St. 418; *Drolesbaugh v. Hill*, 64 Ohio St. 257, 60 N. E. 202; *Mace v. Gaddis*, 3 Wash. Ter. 125, 13 Pac. 545. In some jurisdictions, as in Alabama and North Carolina, this rule is the one adopted by statutory enactment: *Tallman v. Drake*, 116 Ala. 262, 22 South. 485; *Couch v. Davidson*, 109 Ala. 313, 19 South. 507; *Savage v. Matthews*, 98 Ala. 535, 13 South. 328; *Allbright v. Mills*, 86 Ala. 324, 5 South. 591; *Clark v. Lamb*, 76 Ala. 406; *Mason v. Crabtree*, 71 Ala. 479; *State v. Boyd*, 120 N. C. 56, 26 S. E. 700; *Thomas v. Connelly*, 104 N. C. 342, 10 S. E. 520. See, generally, in connection with the distinction between acts *virtute* and *colore officii* as affecting the liability of sureties on official bonds, *Town of Norwalk v. Ireland*, 68 Conn. 1, 35 Atl. 804; *State v. Berkener*, 132 Ind. 371, 32 Am. St. Rep. 257, 31 N. E. 950; *State v. Brown*, 54 Md. 318; *State v. Fowler*, 88 Md. 601, 71 Am. St. Rep. 452, 42 Atl. 201; *Feller v. Gates*, 40 Or. 543, ante, p. 492, 67 Pac. 416, and monographic note to *State v. Timmons*, 78 Am. St. Rep. 420.

4. *Immaterial that Object of Default is Personal Profit.*—In determining whether or not an act done by a public officer is private or official in character, the nature of the act rather than the person who profits by it is the proper ground of discrimination. If, therefore, an officer authorized to issue warrants for a county issues a fraudulent warrant payable to himself, this latter circumstance does not change it from an official to an individual act. Thus, in *Jones v. Commissioners of Lucas Co.*, 57 Ohio St. 189, 63 Am. St. Rep. 710, 48 N. E. 882, an auditor presented a claim for compensation for services to which he was not entitled, and, it having been allowed by the board of county commissioners, the auditor as such drew a warrant on the county treasury payable to himself, and was paid the amount called for. "It is insisted," says Spear, J., delivering the opinion of the court, "that each presentation was simply a personal application for pay for personal services, and the money was drawn by virtue of the allowance of the commissioners after due submission and approval by the board, and that the drawing of money . . . then became a personal, and not an official, act, and hence was not a violation of the official bond. . . . The proposition that the drawing of money from the county treasury by a county auditor upon his own warrant on a claim in his own favor, known by him to be illegal, for alleged services rendered the county is a matter merely of individual action, and not a disregard of official duty, is at least a startling one. It appears to be based upon an attempt to distinguish between the man as an individual and the man as an officer. The distinction cannot hold. . . . The money being drawn upon the auditor's official warrant,

why is not that an official act? We think it is." To the same effect see, where warrants payable to himself were drawn by an auditor of public accounts: *Mahaska Co. v. Ruan*, 45 Iowa, 328; by a city or county clerk: *Spindler v. People*, 154 Ill. 637, 39 N. E. 580, affirming, 51 Ill. App. 613; *Armington v. State*, 45 Ind. 10; *People v. Treadway*, 17 Mich. 480; by a probate judge: *Smith v. Lovell*, 2 Mont. 332.

Where the officer issuing or procuring the warrant had no power to do so as an officer, the case is different. If, for instance, a township trustee without any authority to issue warrants, fraudulently procures one to be certified by the auditor, when, as a matter of fact, the claim for which it purports to be given has already been paid, his act in procuring and cashing the warrant is an individual and not an official act: *State v. Keifer*, 120 Ind. 113, 22 N. E. 107. So where a county clerk prepared and certified a false statement of what the county owed him, the facts being of record, and after the expiration of his term presented it and had it allowed, there was held to have been no breach of his official bond: *People v. Toomey*, 25 Ill. App. 46; affirmed, 122 Ill. 308, 13 N. E. 531. See, also, *State v. Kent*, 53 Ind. 112. Nor are the sureties on the bond of a sheriff liable for his false certification of the bills of third persons against the county, he having no authority or duty to certify such bills: *People v. Foster*, 133 Ill. 496, 23 N. E. 615. Similarly, the bond of a county clerk is not, it is held, and properly, breached by a false certificate being made by the clerk to the effect that a claim in his favor had been allowed by the county, where he had no authority to certify the allowance of any bill or claim: *Ottenstein v. Alpaugh*, 9 Neb. 237, 2 N. W. 219. Where a sheriff presents a claim against the county after the expiration of his term, as provided by law, for money expended by him during his term for the care of prisoners, the presentation of a false claim is not an official, but an individual, act, and the sureties on his official bond are not answerable therefor: *Furlong v. State*, 58 Miss. 717.

5. **Nonpayment of Bills Incurred in Performing Official Duty.**—A question involving very similar considerations arises with reference to the liability of the sureties on an official bond for the refusal or failure of the officer to pay bills incurred by him in the discharge of his duties. If, for instance, the law requires that a sheriff shall advertise a sale, or that a tax collector shall publish notice of a tax sale, does the official bond of such sheriff or tax collector become breached by his failure to pay the printer the amount of his bill, which has been allowed to the officer? By the weight of authority, it is not. Thus, in *Commonwealth v. Swope*, 45 Pa. St. 535, 84 Am. Dec. 518, which was an action by a printer on the official bond of a sheriff to recover money received by the latter for advertising certain notices which it was conceded the Am. St. Rep., Vol. 91—33

sheriff was by law required to advertise, it was held that the action could not be maintained. As was said by the court: "Failure to give such notices would be a breach of his official duty for which his sureties would be liable. But the printer who publishes the notices does his work for the sheriff and not for the parties. His position is no better than that of a sheriff's deputy, or of one who lets to him a horse or a vehicle to enable him to execute process. It does not follow, because his duty to advertise is official, the duty to pay is also official." To the same effect, see *Gould v. State*, 2 Penne. (Del.) 548, 49 Atl. 170, overruling *News Pub. Co. v. Gould*, 1 Penne. (Del.) 366, 40 Atl. 659; *State v. Montague*, 34 Fla. 32, 15 South. 589; *Brown v. Phipps*, 6 Smedes & M. 51; *Allen v. Ramey*, 4 Strob. (S. C.) 30. On the same principle the sureties of a United States marshal are not, it is held, liable on his official bond for his failure to pay his deputies, although he may have been allowed and have received from the government the fees due such deputies: *Ballin v. Blythe*, 46 Fed. 181; *United States v. Fitzsimmons*, 50 Fed. 381; and the bond of a constable is not breached by his failure to pay to one who had kept property levied on by the constable the amount agreed upon as services for keeping it: *Hickman v. State*, 1 Ind. App. 527, 27 N. E. 1110; *Wilson v. State*, 13 Ind. 341. Compare, however, *Martin v. Seeley*, 15 Neb. 136, 17 N. W. 346.

In *State v. Whitworth*, 98 Tenn. 263, 39 S. W. 10, the cases holding that a failure to pay bills for advertising incurred by an officer in the performance of his official duties is not a breach of his official bond are distinguished, on the ground that the statutes of Tennessee, unlike those in the cases referred to, fixed the amount of the printer's fees, instead of leaving it to private contract between the latter and the officer, and made the printer a "party interested" in the fees collected. Where the officer is merely a disburser of fees due from the government, as where a United States marshal receives witness fees for disbursement, his sureties are, of course, liable for his failure to pay them to the persons entitled: *Bollin v. Blythe*, 46 Fed. 181.

6. **Nonpayment by De Facto Officer to De Jure Officer of Fees, etc., Collected.**—The sureties on the bond of an officer de facto are not, it is held, liable to the de jure officer on the recovery of the office by the latter, for the fees, salary, etc., collected by their principal while in possession of the office. The fact that the bond is conditioned for the payment of "all fees or sums of money received, etc., into the proper office or to the person entitled," does not change this rule, the undertaking not having been given to render the sureties liable to the rightful officer for fees earned by the de facto officer or to bind the sureties to a guaranty of the validity of the title of their principal to the office he was exercis-

ing: *Curry v. Wright*, 86 Tenn. 636, 8 S. W. 593; *Bowlett v. White*, 18 Tex. Civ. App. 688, 46 S. W. 372.

c. Liability for Judicial Acts.

1. **General Rule.**—It is also a general rule that an official bond not only does not cover acts of the principal obligor which are of a private or extraofficial character, but extends only to such official acts as are not judicial in their nature. Officers charged with the exercise of judicial functions are by the policy of the law not amenable to civil suit for the manner in which they perform these functions. Where, therefore, an officer upon whom duties, both ministerial and judicial, are imposed is required to give a bond for the faithful performance of the duties of the office, the effect of such bond is not to enlarge his liabilities or render him responsible for acts of a judicial nature for which he was not formerly answerable, but the bond simply furnishes additional security for the proper performance of his ministerial duties, and imposes no new or additional liability for his judicial acts. "The boundary of his judicial character is the line that marks and defines his exemption from civil liability" on the bond as well as apart from the bond, and the liability of his sureties is the same: *McGrew v. Governor*, 19 Ala. 89; *Hamilton v. Williams*, 26 Ala. 527; *Thompson v. Holt*, 52 Ala. 491; *Irion v. Lewis*, 56 Ala. 190; *Grider v. Tally*, 77 Ala. 422, 54 Am. Rep. 65; *Coleman v. Roberts*, 113 Ala. 323, 59 Am. St. Rep. 111, 21 South. 449; *Scott v. Ryan*, 115 Ala. 587, 22 South. 284; *People v. Bartels*, 138 Ill. 322, 27 N. E. 1091; *Place v. Taylor*, 22 Ohio St. 317; *Fairchild v. Keith*, 29 Ohio St. 156; *Commonwealth v. Haines*, 97 Pa. St. 228, 39 Am. Rep. 805.

2. **Where Done Corruptly.**—By the weight of authority the exemption of an officer and his bondsmen from all liability for the consequences of his judicial acts is unaffected by the motives which impel such action. In a few jurisdictions, however, it is held that this exemption does not cover judicial acts corruptly done: *State v. Flinn*, 3 Blackf. (Ind.) 72, 23 Am. Dec. 380; *Gowing v. Gowgill*, 12 Iowa, 495; *Commonwealth v. Tilton*, 23 Ky. Law Rep. 753, 63 S. W. 602. Even in these jurisdictions, however, an error of judgment, or even a judicial act "oppressively and unlawfully done," gives no right of action on the bond. The act must be corruptly done: *State v. Littlefield*, 4 Blackf. 129; *State v. Jackson*, 68 Ind. 58; *Doepfner v. State*, 36 Ind. 11.

3. **What Deemed Judicial Acts.**—In general, an act is judicial "where it is the result of judgment or discretion. When the officer has the authority to hear and determine the rights of person or property or the propriety of doing an act, he is vested with judicial power. . . . Official duty is ministerial when it is absolute, certain and imperative, involving merely the execution of a set task, and when the law which imposes it prescribes and defines

the time, mode and occasion of its performance with such certainty that nothing remains for judgment or discretion. Official action is ministerial when it is the result of performing a certain and specific duty, arising from fixed and designated facts": *People v. Bartels*, 138 Ill. 322, 27 N. E. 1091. The application of this distinction to the particular classes of acts performed by the various classes of public officials will be hereinafter considered in detail.

f. Loss of Funds Without Fault.

1. **In General.**—But few, if any, questions relating to the nature of the acts for which sureties on the bonds of public officers are liable have given rise to as much discussion and conflict as their liability for public moneys once in the custody of their principals, which have been lost without negligence on the part of the custodians. The application of the law in this connection is most frequent in the case of treasurers, who from the nature of their duties are most frequently intrusted with large amounts of public money. The principles governing the question are, however, equally applicable to all classes of public officials intrusted to any extent with public funds, and will, therefore, be considered at this point. The question is treated at some length in the monographic note to *State v. Harper*, 67 Am. Dec. 365.

2. Doctrine that Liability is Absolute as of a Debtor.

A. **In General.**—According to one theory, adopted in a few jurisdictions, an officer receiving public moneys takes title in himself to such funds and becomes a debtor of the city, county, township or state whose money he receives. Like any other debtor, his obligation to repay is absolute, and is not excused by any showing that without his negligence the money has been lost. His position is not, under this theory, that of a bailee of public funds, but that of a debtor owing the county, state or other political district of which he is an officer an amount equal to that he has received. This debt is not to be discharged by the exercise of any amount of care in keeping funds belonging to himself, nor is its payment excused by the fact that such funds have been stolen or lost by inevitable accident, and without any negligence or default on his part: See *Hiatt v. State*, 110 Ind. 472, 11 N. E. 359; *Commonwealth v. Godshaw*, 92 Ky. 435, 17 S. W. 737; *Perley County v. Muskegon*, 32 Mich. 132, 20 Am. Rep. 637; *Muzzy v. Shattuck*, 1 Denio, 233.

B. **Basis of Doctrine.**—The cases adopting this view are based upon the force of the statutes relating to the particular officers whose liability was involved, and where such statutes indicate that the title to the funds in his custody is in the officer, the conclusion reached in these cases is undoubtedly sound. In a number of cases, however, it is said that the liability of the officer to account for moneys received is absolute as a "debtor,"

where it is not meant that he takes title to the money in his custody, but merely that the statutes of the particular state impose upon him an absolute liability to account for all sums received. This absolute liability is, however, quite consistent with the position of a bailee, and what is meant in such cases when they describe the officer's liability as that of a "debtor, an accountant bound to pay over the money he has collected" is that by statute he is bound absolutely to pay over all sums received by him, rather than that he actually takes title "as debtor" to such funds: See, for instance, *State v. Clark*, 73 N. C. 255; *Havens v. Lathene*, 75 N. C. 505. Compare, also, *Hancock v. Hazzard*, 12 Cush. 112, 59 Am. Dec. 171, with *Railroad Nat. Bank v. City of Lowell*, 109 Mass. 214.

C. Effect of Statutes Prohibiting Conversion of Public Funds.—As is said above, the view that a public officer having the custody of public funds takes title thereto and becomes liable therefor as a debtor, rests upon the peculiarity of the statute applicable which impresses his position with that character: See *City of Healdsburg v. Mulligan*, 113 Cal. 205, 45 Pac. 337; *Cumberland County v. Pennell*, 69 Me. 357, 31 Am. Rep. 284. Where, however, the statutes indicate that the officer does not take title to the funds in his charge, as where he is forbidden to make profit from them or to convert them to his own use in any way, it is evident that whatever the liability of such officer for funds lost or stolen without his negligence, he is not liable on the ground that he becomes a "debtor" to the city, county or state for the money received by him: *State v. Houston*, 78 Ala. 576, 56 Am. Rep. 59; *City of Healdsburg v. Mulligan*, 113 Cal. 205, 45 Pac. 337; *United States v. Thomas*, 15 Wall. 337. In such cases the measure of his liability and that of his sureties must be found, either in the general law of bailments, or in the provisions of the statutes controlling and the terms of his bond.

3. Conflict of Authority.—Passing, therefore, to those cases in which the liability of a public officer for public moneys coming into his hands is unaffected by local statutes investing him with title thereto, the question arises whether the sureties on the official bond of such an officer are responsible for losses of funds held by the latter, where such losses have occurred without negligence or other default on his part. As to this the authorities are in an irreconcilable conflict. According to both views, a public officer in charge of public funds is a bailee or custodian merely. The conflict arises, however, in determining the extent of his liability as such bailee and in the selection of the proper criteria for such determination.

4. Doctrine that Liability is Absolute Unless Expressly Qualified.

A. In General.—Under one theory, and the one which is undoubtedly supported by the weight of authority numerically speak-

ing, the officer, while a bailee merely, is one the extent of whose obligations is to be determined from the provisions of the statutes and the terms of his bond, and who, when neither the statute nor bond in terms qualifies or limits his liability, is answerable for all moneys received by him unless he can account for their loss by an act of God or of the public enemy. In other words, unless his liability is expressly qualified, he is an insurer of the safety of the funds intrusted to his charge, except where the loss has arisen from one of the two exceptional causes above mentioned, and no defense of due care or diligence can relieve him or his sureties from responsibility for their loss.

B. Basis of Doctrine.

(1) **Terms of Bond.**—If, under this view, the official bond is conditioned to "pay over" to his successor the funds received by virtue of the office, or to "keep them safely," or if such expressions are to be found in the statutes, although the bond is merely general and for the faithful performance of his duties as an officer, his sureties are deemed to have contracted that he will account absolutely for all sums received by him, and cannot defend because they have been stolen from him or lost without negligence on his part by the failure of a bank in which they were deposited. Under this view, whatever his liability otherwise, his sureties by contracting that he will "pay over," "keep safely," etc., without qualifying their liability in this regard, have assumed a contractual obligation, to be measured by the terms of the bond, and these being unqualified, have agreed to insure the safety of the funds. By the greater number of cases adopting this view it is admitted that the liability of public officers at common law was that of a bailee for hire, and attached only where the loss was caused by their negligence, but the theory of such cases is that where the officer and his sureties have entered into a bond, this forms the true measure of their responsibility, and if without exception or qualification they have contracted that he will turn over to his successor the money received by him, or will keep them safely, or have used other expressions of a like tenor, they are liable if he fails to pay the funds over or keep them safely, however his failure to perform may have been caused—short, perhaps, of an act of God or the public enemy.

(2) **Public Policy.**—In theory, this view of the liability of an officer and his sureties on the official bond rests mainly on the terms of that bond. In fact, however, the rule is quite as much, if not more, the result of a public policy, which is deemed to require a stringent liability. If it be true that the courts have in most cases looked to the terms of the bond to determine the extent of liability of the sureties, it is equally true that in the construction of those terms they have been guided to a great extent by what they regard

as a necessary public policy. Mr. Justice McLean, in delivering the opinion of the court in *United States v. Prescott*, 3 How. 578, thus expressed this view: "Public policy requires that every depositary of the public money should be held to a strict accountability; not only that he should exercise the highest degree of vigilance, but that 'he should keep safely' the moneys which come to his hands. Any relaxation of this condition would open a door to frauds, which might be practised with impunity. A depositary would have nothing more to do than to lay his plans and arrange his proofs, so as to establish his loss without laches on his part."

C. **Loss by Robbery, Theft, etc.**—Perhaps the most frequent application of the rule we have been considering is to those cases in which, without any negligence on the part of the depositary or other officer, money in his charge has been stolen surreptitiously, or with violence. Such theft or robbery, although coupled with no neglect on the part of the officer robbed, does not, according to this view, furnish any defense to an action on his official bond for the amount lost. Unless that instrument qualifies his responsibility where the funds in his charge are stolen without fault on his part, his liability and that of his sureties for such funds is absolute: *Thompson v. Board of Trustees*, 30 Ill. 99; *Halbert v. State*, 22 Ind. 125; *Morbeck v. State*, 28 Ind. 86; *Taylor Dist. Tp. v. Morton*, 37 Iowa, 550 (distinguishing *Ross v. Hatch*, 5 Iowa, 149); *Hennepin Co. Commrs. v. Jones*, 18 Minn. 199; *Redwood Co. Commrs. v. Tower*, 28 Minn. 45, 8 N. W. 907; *State v. Nevin*, 19 Nev. 162, 3 Am. St. Rep. 873, 7 Pac. 650; *United States v. Watts*, 1 N. Mex. 553 (compare *United States v. Swan*, 8 N. Mex. 401, 45 Pac. 980); *Muzzy v. Shattuck*, 1 Denio, 233; *State v. Clark*, 73 N. C. 255; *State v. Blair*, 76 N. C. 78; *State v. Harper*, 6 Ohio St. 607, 67 Am. Dec. 363; *Commonwealth v. Comly*, 3 Pa. St. 372; *Bogg v. State*, 46 Tex. 10; *Coe v. Foree*, 20 Tex. Civ. App. 550, 50 S. W. 616; *United States v. Boyd*, 15 Pet. 187; *United States v. Prescott*, 3 How. 578; *United States v. Morgan*, 11 How. 154; *United States v. Dashill*, 4 Wall. 182; *Boyden v. United States*, 13 Wall. 17; *United States v. Bosbyshell*, 73 Fed. 616, affirmed in 77 Fed. 944, 23 C. C. A. 581; writ of error dismissed, 19 Sup. Ct. Rep. 873; *United States v. Bryan*, 82 Fed. 290; *United States v. Zabriskie*, 87 Fed. 714; *Pond v. United States*, 111 Fed. 989, 49 C. C. A. 582; see, also, *State v. Gatzweiler*, 49 Mo. 16. The fact that the money is stolen by a deputy, even though appointed under civil service rules, does not, it is held, under this rule excuse the officer on whose bond suit is brought: *United States v. Bryan*, 82 Fed. 290; affirmed in 90 Fed. 473, 33 C. C. A. 617. See, also, *United States v. Zabriskie*, 87 Fed. 714; *Pond v. United States*, 111 Fed. 989, 49 C. C. A. 582.

D. **Loss by Inevitable Accident, Fire, etc.**—In the jurisdictions which apply this stringent rule, a loss occasioned by inevitable

accident, such as fire, stands upon the same basis as one resulting from theft, and the sureties on the bond of a public official are held answerable to the same extent: *Clay County v. Simonsen*, 1 Dak. 403, 46 N. W. 592; *Union Dist. Tp. v. Smith*, 39 Iowa, 9, 18 Am. Rep. 59. In a very recent case decided by the supreme court of the United States and not yet officially reported (*Smythe v. United States*, decided January 26, 1903), it appeared that certain treasury notes in the custody of the superintendent of the mint at New Orleans had been destroyed by a fire occurring without his fault or negligence. The court reviewing at considerable length all of the cases previously decided by it relating to the liability of sureties on official bonds for moneys lost or stolen from public officers, says, speaking through Mr. Justice Harlan: "The general rule announced in those cases—and the question need not be discussed anew—is that the obligations of a public officer, who received public moneys under a bond conditioned that he would discharge his duties according to law and safely keep such moneys as came to his hands by virtue of his office, are not to be determined by the principles of the law of bailments, but by the special contract evidenced by his bond conditioned as above stated; consequently, it is no defense to a suit brought by the government upon such a bond that the moneys which were in the custody of the officer had been destroyed by fire occurring without his fault or negligence. The rule, so far from being modified by the *Thomas* case [*United States v. Thomas*, 15 Wall. 337], is reaffirmed by it, subject, however, to the exception (which, indeed, some of the prior cases had, in effect, intimated) that it was a valid defense that the failure of the officer to account for public moneys was attributable to overruling necessity or to the public enemy. The case now before us is not embraced by either exception. The result is that the special defense here made cannot, in view of former adjudications, avail the superintendent or his sureties."

E. Loss by Failure of Depositary.—In a large number of cases the loss of public funds for which it was sought to hold the sureties on official bonds has resulted from the failure of banks in which the principals had deposited such funds. Under the view of the cases which hold the sureties to a strict responsibility on the terms of their contract and on grounds of public policy, the lack of negligence and the good faith of the official in selecting an apparently solvent bank as depositary and his vigilance in seeking to protect the funds deposited, furnishes no defense. His liability was to "keep safely" or to "pay over" absolutely, and his diligence or bona fides is immaterial: *Gaitley v. People*, 24 Colo. 155, 49 Pac. 272 (compare 23 Colo. 227, 64 Pac. 208); *Swift v. Trustees of Schools*, 189 Ill. 584, 60 N. E. 44; affirming 91 Ill. App. 221; *Estate of Ramsey v. People*, 197 Ill. 572, 64 N. E. 549, affirming 97 Ill. App. 283; *Northern Pacific Ry. Co. v. Owens*, 86 Minn. 188, ante, p. 336, 90 N. W. 371; *Griffin v. Board of Commrs.*, 71 Miss. 767, 15 South. 107; *State v.*

Moore, 74 Mo. 413, 41 Am. Rep. 322; Bush v. Johnson County, 48 Neb. 1, 58 Am. St. Rep. 673, 66 N. W. 1023; Thomssen v. Hall Co. (Neb.), 89 N. W. 389; Tillinghast v. Merrill, 151 N. Y. 135, 56 Am. St. Rep. 612, 45 N. E. 375, affirming 77 Hun, 481, 28 N. Y. Supp. 1089; Havens v. Lathene, 75 N. C. 505; Van Trees v. Territory, 7 Okla. 353, 54 Pac. 495; Nason v. Directors of Poor, 126 Pa. St. 445, 17 Atl. 616; Commonwealth v. Bailey, 129 Pa. St. 480, 10 Atl. 764; Wilson v. Wichita County, 67 Tex. 647, 4 S. W. 67; McKinney v. Robinson, 84 Tex. 489, 19 S. W. 699; Fairchild v. Hedges, 14 Wash. 117, 44 Pac. 125. See, also, Maloy v. Board of Commrs. of Bernalillo Co., 10 N. Mex. 638, 62 Pac. 1106.

F. Loss by Act of God or Public Enemy.

(1) In General.—In nearly all of the cases adopting the rule of strict liability on official bonds for losses occurring without negligence, an exception is stated to exist where the loss is caused by an act of God or of the public enemy. By this is not meant that the sureties are relieved from responsibility for losses occurring by inevitable accident, for "inevitable accident" is, legally speaking, not synonymous with the phrase "act of God," and sureties are, as we have seen (*supra*, II, § 4, D), held liable for loss arising from an agency, such as fire. A failure to distinguish between these classes of destructive agencies has, in some cases, led to the statement that according to one line of cases, sureties are absolute insurers, though the loss be caused by an act of God. Except, however, for some casual dicta in a few cases (see, for instance, *State v. Clark*, 73 N. C. 255; *Havens v. Lathene*, 75 N. C. 505), the authorities are uniform in recognizing losses arising from the operation of an act of God or the public enemy as furnishing an exception to the general rule of liability on the part of the surety under even the most stringent view. Thus, in *United States v. Thomas*, 15 Wall. 837, it was held that a depository of public moneys and the sureties on his official bond were not responsible for money seized by the rebel authorities by the use of force. This was held to constitute an act of the public enemy for which, upon any ground of liability, a bailee (which the officer was shown to be) could not properly be held answerable. Mr. Justice Miller, in a dissenting opinion, after expressing his dissatisfaction with the strict liability in cases of loss by public officials without negligence which had been declared and imposed by the previous cases decided by the court, doubted the principle of public policy which was supposed to demand the rule. He then continued: "Still more strongly do I dissent from the distinction attempted to be drawn between this case and those. If a theft or robbery in time of profound peace can be so easily simulated, and the collusion can be so successful that public policy requires that no such defense be listened to, I leave it to any ordinary understanding to say how much more easily the pretense of force by the rebels can be arranged and proved by consenting parties, and how much

more difficult for the government to disprove such collusive arrangements than in the other case mentioned." The doctrine that acts of a public enemy do not render sureties answerable for the losses occasioned by them is, however, uniformly accepted, and has very recently been recognized by the federal supreme court: See *Smythe v. United States*, decided January 26, 1903.

(2) **What Constitutes Act of Public Enemy.**—To amount to an act of the public enemy within the meaning of this exception, the facts relied upon as a defense must have consisted in, or been accompanied by, the coercion of armed forces. Mere payment of the money held in accordance with an act of the Confederate Congress and on a requisition from the Confederate authorities, unaccompanied by the application of any physical force, furnished, it was held, no defense to any action on the bond of the official making the payment: *United States v. Keebler*, 9 Wall. 83; *United States v. Morrison*, Fed. Cas. No. 15,817. In *United States v. Humason*, 6 Saw. 199, Fed. Cas. No. 15,421, where a public officer was lost at sea, together with public funds in his custody, and without negligence on his part, it was held that the breach of the official bond had been caused by an "act of God," and the sureties were held not liable.

G. Private Funds Officially Held by Public Officers.—In the great majority of cases the loss for which reparation is sought by an action on the official bond is from public funds held by the officer. Public officers are, however, by law at times required to assume the custody of funds which are not, strictly speaking, public funds, as where a clerk of court receives money paid in in condemnation proceedings, or a probate judge assumes custody under the law of money awaiting distribution. Assuming that the receipt of such funds as an officer is authorized by law, so that there may be no question as to whether their receipt was extraofficial or not, the question still remains whether in those states in which public officers are held "insurers" of public funds in their charge the same measure of liability applies to funds held for private individuals.

(1) **View That Liability is for Negligent Loss Only.**—According to one view the same rule is not properly applicable to such private funds as the courts apply with reference to funds actually owned by the city, county or state. Thus, in *Gartley v. People*, 28 Colo. 227, 64 Pac. 208, funds awaiting distribution were paid by the administrator of an estate to the county treasurer as provided by law. The money having been lost without negligence by the county treasurer, through the failure of a bank in which he had deposited it, suit was brought on his official bond. "Such funds," says Mr. Justice Garbert, delivering the opinion of the court, "by virtue of having been paid to the treasurer, did not become the property of the county. The latter, through its treasurer, became the mere bailee of these moneys, with the obligation imposed to pay them, without interest, to such persons as the county court having administration of the

estate might direct. As the custodian of these funds, it was only bound to exercise that degree of care, through its treasurer, in protecting them from loss which a reasonably prudent man would in like circumstances. The liability of the agent would be no greater than that of the principal; in other words, if the county was not responsible for the loss of such funds, its agent would not be, either to the county or the persons entitled thereto. . . . The funds received by the treasurer from the administrator were deposited in a bank reputed to be sound. He was the mere custodian of those funds by order of the court under whose direction they were placed in his hands. It appears from the averments of this amendment that he was not guilty of negligence in permitting them to remain in this bank. On the contrary, it appears that he exercised the same degree of care with respect to these funds which a reasonably prudent person would have ordinarily employed in caring for his own. They were not public, and did not belong to the county. The demurrer to the amended defense should have been overruled." To the same effect are *Wilson v. People*, 19 Colo. 199, 41 Am. St. Rep. 243, 34 Pac. 344 (as distinguished in *Gartley v. People*, 24 Colo. 155, 49 Pac. 272, and *Van Trees v. Territory*, 7 Okla. 353, 54 Pac. 495), and *People v. Faulkner*, 107 N. Y. 477, 14 N. E. 415. See, also, *State v. Gramm*, 7 Wyo. 329, 52 Pac. 533.

(2) **View that Liability is Absolute.**—On the other hand, the distinction made by these cases is repudiated in a recent case decided by the supreme court of Minnesota (*Northern Pac. Ry. Co. v. Owens*, 86 Minn. 188, ante, p. 336, 90 N. W. 371), where money paid into court in condemnation proceedings was lost by the failure of a bank in which the clerk of the court had deposited it, acting in the exercise of reasonable care. Suit being brought on his official bond, the court thus disposed of the argument drawn from the distinction taken by the cases above cited: "Upon principle, we are unable to make any distinction between public and private funds in the hands of a public officer as to his liability therefor. In both cases the funds are paid to the officer in obedience to the mandate of the statute, which makes no distinction between them and imposes the same duty as to each. The same bond secures both in the same terms. Can it be true that a county can recover on such a bond the amount of a forfeited recognizance lost by a clerk without his fault, but that money received by him in his official capacity for a private party, and so lost, cannot be recovered by an action on the same bond? It is not the character of the fund, but the statute and considerations of public policy, which impose the liability upon the officers. The same considerations of public policy which require that public officers who receive public money be held to a strict measure of responsibility therefor apply just as forcibly to private funds officially received by them, for private property is just as

sacred as public property. . . . We hold, therefore, that a public officer is liable for the loss of private funds received and held by him in his official capacity whenever he would be liable for the loss of public funds under the same circumstances, for in respect to his liability for the loss of money in his official custody, there is no distinction between public and private funds." The reasoning is convincing.

H. When Liability is Qualified by Official Bond.—In those jurisdictions in which the strict measure of responsibility, is favored great reliance is, as we have seen, placed upon the fact that the terms of the bond are unqualified, and call for the payment over or safekeeping of the money received without excepting losses from any cause. Where, therefore, this circumstance is not present, but the bond is conditioned for the exercise of "all reasonable diligence and care in the preservation and disposal of all money," etc., "reasonable diligence" is all that is required, and if a loss occurs in spite of such diligence, as by theft or robbery, the sureties on the bond are not answerable therefor: *Ross v. Hatch*, 5 Iowa, 149. Even where the bond is in this form, however, the fact that money was lost by the failure of a bank, without any negligence on the part of the officer making the deposit will not relieve the sureties, where by statute loans of public funds are forbidden. The deposit, however, carefully made, is itself a breach of the statute and of the official bond: *Lowry v. Polk County*, 51 Iowa, 50, 33 Am. Rep. 114, 49 N. W. 1049.

In *District Tp. of Union v. Smith*, 39 Iowa, 9, 18 Am. Rep. 39, it was held that a bond conditioned for the faithful performance of the duties of treasurer "to the best of his ability and according to law," did not qualify the strict measure of responsibility because of the words "to the best of his ability." "It would, indeed, be an extraordinarily liberal construction of these words that would discover in them a condition exempting the officer from performance of his duty on account of accident, or inability brought about by accident. He is obligated by the bond to discharge his duty to the best of his ability. Without the words used he would be so bound, for it can hardly be claimed that anything more or less can be required of a public officer. But admitting that they have special force, it certainly cannot be claimed that they operate to exempt the defendants from liabilities resulting from accident that would otherwise exist. . . . It is vain to say that they express any such thought as that the defendants have provided by stipulation to the effect that they shall be excused from the performance of the consideration of the contract by accident over which they have no control." If the words express any thought whatever, their only possible effect would seem to be that denied them in the language quoted.

5. Doctrine That Liability is for Loss by Negligence Only.

A. In General.—We have up to this point considered two theories respecting the validity of sureties on official bonds for funds lost by or stolen from their principals. One rests upon local statutes, the effect of which is to vest title in a public officer to public funds received by him, and to hold him and his sureties responsible for the repayment of the amount, regardless of loss of the funds from any cause whatever. The second, based upon the absolute terms of the official bond and considerations of public policy, imposes the liability of an insurer against loss from any cause except an act of God or the public enemy, unless such absolute liability is expressly stipulated against in the bond. Conflicting with these, particularly with the second, is a third theory as to the liability of sureties, which holds them liable for such losses only as are caused by the negligence or default of their principal.

Adopting this view are the states of Alabama, California, Maine, Montana, South Carolina, Tennessee and Wyoming. Though much fewer in number than those authorities which insist upon the more stringent measure of responsibility, the cases supporting the minority view are very well reasoned, and on principle seem preferable.

B. Basis of Doctrine.—According to these cases, the terms of the bond form no new basis of responsibility. As was said by Mr. Justice Miller, in his dissent from the majority opinion in *United States v. Thomas*, 82 U. S. (15 Wall.) 337: "I do not believe, now, that on sound principle the bond should be construed to extend the obligation of the depositary beyond what the law imposes upon him, though it may contain words of express promise to pay over money. I think the true construction of such a promise is to pay when the law would require it of the receiver if no bond had been given, the object of taking the bond being to obtain sureties for the performance of that obligation."

As to the public policy which, in the majority of states, is deemed to require a stringent measure of responsibility, its existence is uniformly and forcibly denied by the cases adopting the more lenient rule. What was characterized in *Cumberland County v. Pennell*, 69 Me. 357, 31 Am. Rep. 284, as a "new-born public policy, based upon supposed facility or temptation which depositaries of public money are said to possess for collusive robbery," is thus denied in *City of Healdsburg v. Mulligan*, 113 Cal. 205, 45 Pac. 337: "It is urged in many of the cases which hold the officer to an absolute responsibility for all moneys coming to his hands, that if robbery or larceny were held to be a defense, it would endanger the security of public funds and encourage simulated robberies and pretended larcenies. But we cannot assume that courts of justice are unable to protect the public in such cases, and even if they could not do so in all cases, justice does not require that the public shall be protected by enforcing against its servant, the officer and his sureties, a liability the law

has not imposed upon them, and which they have not assumed." Indeed, public policy is in the Maine case (*Cumberland County v. Pennell*, 69 Me. 357, 31 Am. Rep. 284) relied upon to sustain the less rigorous rule on the ground that many persons willing to vouch for the integrity of a public official "would long hesitate to insure the public against possible loss happening in spite of such qualities; for to insure against such a loss is not only vouching for the integrity of the officer, but practically for that of the rest of mankind—that they will not rob him." That the rule of public policy relied upon by the cases adopting the rule of strict responsibility has not equally impressed the legislatures in those jurisdictions is shown by the acts of Congress relieving certain classes of federal officers from the strict liability imposed by the rule adopted by the United States supreme court (see monographic note to *State v. Harper*, 67 Am. Dec. 370), and the special laws in a number of jurisdictions relieving public officials who claimed to have suffered loss in the absence of neglect: See *State v. Gramm*, 7 Wyo. 329-359, 52 Pac. 533.

C. *Authorities Supporting Doctrine.*—For the authorities adopting the view that neither by general terms in the official bond, nor because of a supposed public policy are sureties on official bonds answerable for losses of public funds not traceable to neglect or default of their principals, see *State v. Houston*, 78 Ala. 576, 56 Am. Rep. 59; *City of Healdsburg v. Mulligan*, 113 Cal. 205, 45 Pac. 337; *Sonoma County v. Stofen*, 125 Cal. 32, 57 Pac. 681; *Cumberland County v. Pennell*, 69 Me. 357, 31 Am. Rep. 284; *City of Livingston v. Woods*, 20 Mont. 91, 49 Pac. 437, overruling *Jefferson County Commrs. v. Lineberger*, 3 Mont. 231, 35 Am. Rep. 462; *York County v. Watson*, 15 S. C. 1, 40 Am. Rep. 675; *State v. Copeland*, 96 Tenn. 296, 54 Am. St. Rep. 840, 34 S. W. 427; *State v. Gramm*, 7 Wyo. 329, 52 Pac. 533; *Roberts v. Board of Commrs. of Laramie Co.*, 8 Wyo. 177, 56 Pac. 915; *Miller, J.*, dissenting, in *United States v. Thomas*, 15 Wall. 337. See, also, *Albany Co. Supervisors v. Dorr*, 7 Hill, 583; affirmed, 25 Wend. 440; overruled in *Tillinghast v. Merrill*, 151 N. Y. 135, 56 Am. St. Rep. 612, 45 N. E. 375.

D. *Where Loss is Negligent, or After Previous Default.*—Where the official from whose custody the funds were lost has, by his negligence, contributed to the loss, his sureties are, of course, responsible: *State v. Houston*, 78 Ala. 576, 56 Am. Rep. 59. Whether he has been so negligent is, however, in each case a question of fact: *State v. Houston*, 83 Ala. 361, 3 South. 859. And where the loss is claimed to have arisen from robbery, the defense to avail the sureties must be clearly shown: *Sonoma County v. Stofen*, 125 Cal. 32, 57 Pac. 681. Where by making a deposit in bank of public funds in violation of a statute prohibiting this, or where by a failure to pay over funds to the county treasurer when required by law, the official bond has been breached, the fact that a subsequent loss of

the funds occurred without any negligence on the part of the custodian furnishes no defense to the sureties. The default of the official had taken place, and his liability and that of his bondsmen became fixed before the actual loss occurred: *Alston v. State*, 92 Ala. 124, 9 South. 732; *Johnson Co. v. Hughes*, 12 Iowa, 360; *State v. Lanier*, 31 La. Ann. 432; *Monticello v. Lowell*, 70 Me. 437; *Bevans v. United States*, 13 Wall. 56.

g. Liability for Interest Received on Public Funds.—The liability of an officer and the sureties on his official bond for interest received by him on public funds which he has employed is in some states provided for by express statute requiring him to pay over all profits so received: *Cooper v. People*, 85 Ill. 417; *Hughes v. People*, 82 Ill. 78. See, also, *Session Laws of Colorado of 1891*, p. 196. In the absence of such a statute, however, the liability of a public officer and his sureties for interest on the public funds received by him seems to be held by the courts to depend upon the measure of such officer's responsibility on his bond for money lost without neglect on his part. Accordingly, in those jurisdictions where the liability of the officer is held to be absolute, no action can be maintained against the sureties for interest received by the officer, although the loaning of public funds is made a felony or prohibited: *State v. Walsen*, 17 Colo. 170, 28 Pac. 1119. Compare *Arapahoe County v. Hall*, 9 Colo. App. 538, 49 Pac. 370; *Renfree v. Colquitt*, 74 Ga. 618; *Shelton v. State*, 53 Ind. 331, 21 Am. Rep. 197; *Rock v. Stinger*, 36 Ind. 346; *Commonwealth v. Gadshaw*, 92 Ky. 435, 17 S. W. 737; *Maloy v. Board of Commissioners*, 10 N. Mex. 638, 62 Pac. 1106. Where, however, the less stringent rule is upheld, the sureties are, it seems, held responsible for profits made by the principal from loans of the public moneys held by him (see *State v. Walsen*, 17 Colo. 170, 28 Pac. 1119, and *Maloy v. Board of Commissioners*, 10 N. Mex. 638, 62 Pac. 1106), and interest is recoverable only after a breach of the bond.

h. Necessity of Demand of Performance.—Where an officer is by statute required to pay over money to a certain official at a certain time, or to turn over the property in his hands to his successor, such payment and delivery at the time specified is an active duty, and if he fail to perform it, his bond is breached. There need not, in such case, be any demand that he perform: *San Francisco v. Heyneman*, 71 Cal. 153, 11 Pac. 870; *Clay County v. Simonsen*, 1 Dak. 403, 46 N. W. 592; *Wake Co. Commrs. v. Magnin*, 86 N. C. 285; *Wooland v. Favorite*, 17 Ohio C. C. 72; *State v. Lake*, 30 S. C. 43, 8 S. E. 322. Where, however, he holds such money for a private person, and no precise time is fixed by statute for its payment, or no person fixed as the proper payee, his failure to pay constitutes no breach of the bond until a demand and refusal: *Price v. Farrar*, 5 Ill. App. 536; *State v. Dent*, 121 Mo. 162, 25 S. W. 924; *Furman v. Timberlake*, 93 N. C. 66; *State v. Bird*, 2 Rich. (S. C.) 99. Compare, however, *Governor v.*

Roley, 34 Ga. 173. Where the breach of the bond occurs prior to the failure to pay, there need, of course, be no demand of payment. Such is the case where the money has been converted previous to the time when it must be paid: *Furman v. Timberlake*, 93 N. C. 66. So where a seizure of property by a sheriff is itself a breach of the bond, there need be no demand for a return of the property: *Dishnean v. Newton*, 91 Wis. 199, 64 N. W. 879. Similarly, it is held in Missouri that where a county clerk makes a correct report of fees received by him, there is no breach of the bond for failure to pay them into the county treasury until ordered to do so by the county court: *State v. Dent*, 121 Mo. 162, 25 S. W. 924; but where such reports are fraudulent and deceitful, no subsequent demand or order by the court is necessary to fix a breach of the bond of the clerk: *State v. Henderson*, 142 Mo. 598, 44 S. W. 737; *State v. Chick*, 146 Mo. 645, 48 S. W. 829; *State v. Gideon*, 158 Mo. 327, 59 S. W. 99.

1. **Liability for Statutory Penalties.**—Any extended discussion of the elements or measure of damages in actions against sureties on official bonds is outside of the scope of this note, and will not be attempted. There are, however, one or two principles connected with these questions which are relevant to a discussion of the acts for which such sureties are liable.

Where a certain act is prohibited or required of a public officer, and the statute imposes a penalty upon him for noncompliance, it is frequently a question whether the sureties on his bond are likewise responsible for the statutory penalty. Where the statute expressly or by necessary implication subjects them to the penalty, they are, of course, answerable to that extent: *Wilson v. Young*, 58 Ark. 593, 25 S. W. 870; *Kerr v. Atkinson*, 40 Ark. 377. See, also, *Christian v. Ashley Co.*, 24 Ark. 142; *Norris v. State*, 22 Ark. 524; *Rose v. Cobb*, 64 Mo. 464; *State v. Peterson*, 142 Mo. 526, 39 S. W. 453, 40 S. W. 1094; *Territory v. Carson*, 7 Mont. 417, 16 Pac. 569. See, also, *State v. Allen*, 48 W. Va. 154, 86 Am. St. Rep. 29, 35 S. E. 990. In a number of cases, however, the statute did not necessarily impose the penalty on the sureties, and yet it was held to be recoverable against them, as well as against the principal: *Tappan v. People*, 67 Ill. 339; *State v. Hays*, 7 La. Ann. 118; *State v. Breed*, 10 La. Ann. 492; *State v. Hampton*, 14 La. Ann. 679; *Eastin v. School Directors*, 40 La. Ann. 705, 4 South. 880; *Joyner v. Roberts*, 112 N. C. 111, 16 S. E. 917; *Jerould Co. v. Williams*, 7 S. Dak. 196, 63 N. W. 905; *State v. McDannel* (Tenn.), 59 S. W. 451.

On the other hand, it is held by many cases that sureties are not liable for fines and forfeitures imposed upon their principal by statute, unless such liability is very plainly prescribed by the statute. The bond, it is said, is essentially a contract of indemnity, and the sureties undertake to answer only for such damage as may be caused by a breach of the bond. A penalty for forfeiture is in no proper sense a damage sustained, but is rather a means of punish-

ing a delinquent official, and not to be regarded as within the purview of the bond, unless made so by statute: *Brooks v. Governor*, 17 Ala. 806; *Jeffreys v. Malone*, 105 Ala. 489, 17 South. 21; *Wilson v. Lowry* (Ariz.), 52 Pac. 777; *Glascock v. Ashman*, 52 Cal. 494; *State Bank v. Brennan*, 7 Colo. App. 427, 43 Pac. 1050; *Robinson v. Kinney*, 2 Idaho, 1170, 31 Pac. 915; *State v. Flynn*, 157 Ind. 52, 60 N. E. 684; *Foot v. Vanzandt*, 34 Miss. 40; *State v. Hall*, 68 Miss. 719, 10 South. 54; *Knapp v. Sweet*, 24 N. Y. Supp. 817; *Treasurers v. Hilliard*, 8 Rich. (S. C.) 412; *McDowell v. Burwell*, 4 Rand. (Va.) 317. For a similar holding as to the liability of the sureties of a sheriff for pecuniary damages properly assessable against the latter, see *Johnson v. Williams* (Ky.), 63 S. W. 759.

j. Liability Where Default is from Several Funds Covered by Separate Official Bonds.—Where an officer holds two funds for each of which a separate bond is given, the sureties on one are not liable for his defaults with respect to the bond covered by the other bond: See, *supra*, II, c. Where the officer has mingled the two funds, and appropriated from the mass, the sureties on both bonds are liable, each set for such proportion of the deficit as the fund covered by their bond bore to the whole sum: *People v. Stewart*, 6 Ill. App. 62; *Board of Commissioners v. Knudson*, 82 Minn. 151, 84 N. W. 657; *Frost v. Mixsell*, 38 N. J. Eq. 586; *Britton v. City of Fort Worth*, 78 Tex. 227, 14 S. W. 585.

k. Good Faith of Officer Immaterial.—The liability of an officer performing judicial functions for acts corruptly done has already been touched upon: *Supra*, p. 515. Apart from this, however, the good faith or absence of improper motives in the principal obligor furnishes no defense to the sureties on his bond in an action for its breach. Fraudulent and dishonest acts are not the only ones for which the bond stands as indemnity: *Palmer v. Pettingill* (Idaho), 55 Pac. 653; *Marshall Field & Co. v. Wallace*, 89 Iowa, 597, 57 N. W. 303; *Wemtz v. Kramer*, 44 La. Ann. 35, 10 South. 416; *People v. Colby*, 39 Mich. 456; *Van Etten v. Commonwealth*, 102 Pa. St. 596; *United States v. Thorn*, Fed. Cas. No. 16,493. Compare, however, *Iowa Co. Supervisors v. Vivian*, 31 Wis. 217; *Alexander v. Corse*, 2 Cranch C. C. 363, Fed. Cas. No. 183; *Bank of United States v. Brent*, 2 Cranch C. C. 696, Fed. Cas. No. 910.

1. Negligence or Default of Other Officers.

1. Where the Cause of Principal's Default.—The sureties on the bond of one officer do not assume responsibility for the acts or defaults of other public officials. Where, therefore, the neglect or illegal acts of other officials have rendered their principal unable to perform his duties according to law, they cannot be held liable for a failure to perform arising from such inability. The bond of a county treasurer, for instance, is not breached by a failure to make

a report of delinquent taxes at the time specified by law, where the rendering of the report is made impossible by the failure of tax collectors to return their reports in season: *Houghton County Supervisors v. Rees*, 34 Mich. 481. So a constable does not render his sureties liable for his failure to collect, where the judgment on which the collection was sought has been superseded, although by the mistake of the justice the supersedeas was invalid: *State v. Keech*, 16 Md. 512; nor are the bondsmen of a postmaster responsible for a loss of funds by theft from the depository to which he had remitted: *Prairie School Tp. v. Haseleu*, 3 N. Dak. 328, 55 N. W. 938. On the same principle it is held that the bond of a county auditor is not breached by placing on the assessment-roll assessments as illegally reduced by the board of equalization: *State v. Fish*, 4 Nev. 216; nor are a school treasurer and the sureties on his bond liable for moneys not paid to him for bonds wrongly negotiated by the school board: *Prairie School Tp. v. Haseleu*, 3 N. Dak. 328, 55 N. W. 938. Where by law an officer is required to give a special bond for particular duties, the failure or neglect of other officers to require such bond cannot render the sureties on his general bond liable for his proper performance of those duties: *Hunter v. Routledge*, 51 N. C. 216.

2. Where not Cause of Principal's Default.—On the other hand, where the negligence or wrongful acts of other officers has not been the cause of their principal's default, such negligence, it is well settled, furnishes no defense whatever to the sureties. "The official bond of a county treasurer is intended to secure the public from loss by reason of the official delinquency of that officer. For that purpose a bond is required. For that purpose it is deemed to be given. The obligation of the sureties of the treasurer is such as is declared in the condition of the bond. It is not contingent upon the integrity of other public officers, nor upon the faithful performance by them of their official duties. The sureties upon such a bond enjoy whatever protection there may be in the law imposing supervisory duties upon other public officers; but there is no undertaking or guaranty on the part of the county, or of the state, in favor of such sureties, either express or implied, that the requirements of the law shall be complied with—that public officers shall perform their prescribed duties, nor that they shall not be guilty of criminal malfeasance. There is no such condition affecting the contract expressed in the bond": *Board of Commrs. v. Sheehan*, 42 Minn. 57, 43 N. W. 690. The fact, therefore, that the negligence, collusion, or criminality of other officials has made possible or aided the default of the principal obligor in an official bond, or that but for their laches his defaults would have been earlier discovered, furnishes no defense to his sureties in an action on the bond: *Jackson Co. v. Derrick*, 117 Ala. 848, 23 South. 193; *Stera v. People*, 102 Ill. 540; *People v. Foster*, 133

Ill. 496, 23 N. E. 615; *Campbell v. People*, 154 Ill. 595, 39 N. E. 578, affirming 52 Ill. App. 338; *Estate of Ramsay v. People*, 197 Ill. 572, 90 Am. St. Rep. 177, 64 N. E. 549; *Spindler v. People*, 51 Ill. App. 613, affirmed in 154 Ill. 637, 39 N. E. 580; *Armington v. State*, 45 Ind. 10; *Hague v. State*, 28 Ind. App. 285, 62 N. E. 656; *Commra. v. Tate*, 89 Ky. 587, 13 S. W. 113; *State v. Powell*, 40 La. Ann. 234, 8 Am. St. Rep. 522, 4 South. 46; *Johnson v. Goodridge*, 15 Me. 29; *Town of Winthrop v. Soule*, 175 Mass. 400, 56 N. E. 575; *People v. Treadway*, 17 Mich. 480; *Board of County Commra. v. Sheehan*, 42 Minn. 57, 43 N. W. 690; *Lewis v. State*, 65 Miss. 468, 4 South. 429; *Bush v. Johnson Co.*, 48 Neb. 1, 58 Am. St. Rep. 673, 66 N. W. 1023; *Commonwealth v. Holmes (Va.)*, 25 Gratt. 771; *United States v. Boyd*, 15 Pet. 187; *United States v. Bee*, 54 Fed. 112, 4 C. C. A. 219; *United States v. Adams*, 54 Fed. 114; *United States v. Cutter*, 2 Curt. 617, Fed. Cas. No. 14,911.

III. Liability of Sureties on Bonds of Various Classes of Officers.

a. Sheriffs, Constables, etc.

1. *In General.*—Having now considered the more general principles which determine the acts for which sureties on official bonds are liable, the application of these principles to the sureties on the bonds of the particular classes of public officers remains to be considered. Separate treatment in connection with each of the numerous public offices recognized by the laws of the various jurisdictions is, of course, neither practicable nor advisable, and in the following discussion those offices the duties of which are of the same nature will be considered together. Of the classes so formed, the first to be discussed will be that into which fall those officers whose principal duties consist in the service and execution of process and other functions of a similar nature. This class includes such officials as sheriffs, constables, United States and town marshals, etc.

2. Failure to Execute Writ.

A. *General Rule.*—Where an officer charged with the duty of levying process fails or refuses to do so, such failure is, of course, an omission amounting to a breach of his official bond, and renders his bondsmen liable for the resultant damage: *Mathis v. Carpenter*, 95 Ala. 156, 36 Am. St. Rep. 187, 10 South. 341; *Shannon v. Commonwealth*, 8 Serg. & R. (Pa.) 444. See, also, *People v. Lucas*, 93 N. Y. 585. On the same principle the bond is breached by a levy on property insufficient to pay an attachment, where the attachment defendant had other property: *Sutherland v. McKinney*, 10 N. Y. Supp. 876, 18 Civ. Proc. Rep. 216. This, however, assumes that the process is such that he is in law bound to execute it, and where it is void, no liability can arise against either the officer or his sureties for failure to levy: *Hawkins v. Commonwealth*, 17 Ky. (1 T. B. Mon.) 144; *Williamston v. Willis*, 81 Mass. (15 Gray) 427. So a sheriff not be-

ing empowered to serve process on his deputy is not chargeable on his bond for failure to do so: *Dane v. Gilmore*, 51 Me. 544; and cannot be held for failure to arrest the officers of a corporation on process running against the corporation: *Hall etc. Co. v. Barnes*, 115 Ga. 945, 42 S. E. 276. Failure to execute a *fiery facias*, where the plaintiff himself authorizes the sheriff to desist from the levy is not a breach of the official bond: *Callier v. Stoddard*, 19 Ga. 274. Where a writ of attachment is placed in the hands of a sheriff to levy, a bond of indemnity given, and property in the possession of the defendant, apparently subject to levy, is pointed out, the sheriff is *prima facie* liable for a failure to make the levy, and the burden rests on him to show that the property was exempt: *Mathis v. Carpenter*, 95 Ala. 156, 36 Am. St. Rep. 187, 10 South. 341. Only nominal damages are recoverable where it does not appear that the failure to levy execution has prevented the collection of the debt from the judgment debtor: *Brunhild v. Potter*, 107 N. C. 415, 12 S. E. 55. In California, it is held that the sureties on a sheriff's bond are not liable for a penalty imposed by statute against their principal for neglect to levy when requested: *Glascock v. Ashman*, 52 Cal. 494. This, however, is a question upon which the authorities are not harmonious: *Supra*, II, i.

B. As Agent for Collection.—Where it is made the duty of a sheriff to collect fees due a clerk: *Logan v. State*, 39 Md. 177; or militia fines delivered him for collection: *Bartlett v. Prather*, 2 Bibb (Ky.), 586; his failure to do so is a breach of his official bond. It is, however, no part of the official duty of a sheriff or constable to act as collection agent, or to take out execution in behalf of private persons. If, having contracted to do these things, he fails to perform the contract, the liability incurred is for failure to perform any extra-official acts, and is personal to the officer. It does not attach to the sureties on his official bond: *Snell v. Allen*, 31 Tenn. (1 Swan) 208; *State v. McCollum*, 61 Tenn. (2 Baxt.) 102.

3. Seizure, Arrest, etc., Without Process.

A. Of Property.—The rightful authority of peace officers of the class under consideration to seize the person or property of an individual is, particularly as regards the seizure or sale of property, ordinarily derivable only from a warrant or other process, regular on its face, directed to the officer, and commanding him to make the seizure or sale. The liability of the sureties, as we have seen, covers only such acts as are official in their nature, and it is, therefore, a question of not infrequent occurrence, and involved in no little difficulty, whether or not such sureties are responsible for the acts of their principal, done without process, or under defective process, or in excess of the authority conferred by the process held.

By the weight of authority, a levy or sale by a sheriff or constable made without process is a personal trespass, and an act for

which his sureties are in no way answerable. According to the cases taking this view, such an officer who assumes to act in the seizure of the property of another without any writ or warrant giving him authority so to act does not, in any sense, act officially: *Best v. Johnson*, 78 Cal. 217, 12 Am. St. Rep. 41, 20 Pac. 415; *Commonwealth v. Cole*, 7 B. Mon. 250, 46 Am. Dec. 506, and monographic note, pp. 509, 515; *Eaton v. Kelly*, 72 N. C. 110; *Gerber v. Ackley*, 37 Wis. 43, 19 Am. Rep. 751; *Chandler v. Rutherford*, 101 Fed. 774, 43 C. C. A. 218. See, also, *Governor v. Perrine*, 23 Ala. 807. Nor under these cases is it material that the officer in making the levy or sale claimed to possess and be acting under process. A mere claim of process does not, it is held, make his personal trespass an official act or the less a trespass: *Commonwealth v. Cole*, 7 B. Mon. 250, 46 Am. Dec. 506; *Gerber v. Ackley*, 37 Wis. 43, 19 Am. Rep. 751.

There are, however, cases taking the opposite view. Thus, in *Ader v. Foley*, 50 La. Ann. 1262, 24 South. 333, it was held that the sureties of a constable were liable for his act in seizing the property of the plaintiff without any writ whatever, where he erroneously believed that a note from the owner authorized the seizure. And in *State v. Edmundson*, 71 Mo. App. 172, the sureties of a constable were held liable under very similar circumstances, where the officer acting without writ, but believing that a memorandum of costs gave him authority, levied on and sold the property of an individual. These cases may both, perhaps, be more properly regarded, by reason of the belief of the officer that he held process, as cases in which the levy was made under process void on its face: See, post, III, a, 4, A. For the liability of the sureties of an officer for his misappropriation of the proceeds of a levy or sale made without process, see post, III, a, 5, A.

B. Of Persons.

(1) **General Rule.**—Ordinarily, an officer, in making an arrest of the person of an individual, must act under process quite the same as in making a seizure of his property. If, therefore, he assumes to make an arrest without warrant, he acts, according to one line of cases representing, it seems, the weight of authority, outside of his official capacity, and commits a personal trespass for which his sureties are not answerable: *Hawkins v. Thomas*, 3 Ind. App. 399, 29 N. E. 157; *State v. McDonough*, 9 Mo. App. 63 (compare *State v. Edmundson*, 71 Mo. App. 172); *Kendall v. Aleshire*, 28 Neb. 707, 26 Am. St. Rep. 367, 45 N. W. 167; *Dysart v. Lurty*, 3 Okla. 601, 41 Pac. 724; *Marquis v. Willard*, 12 Wash. 528, 50 Am. St. Rep. 906, 41 Pac. 889; *Chandler v. Rutherford*, 101 Fed. 774, 43 C. C. A. 218, affirming 2 Ind. Ter. 379, 51 S. W. 981. It is held in North Carolina, on the other hand, that where the statute extends official bonds to cover all acts done "by virtue and under color of office," an arrest

without warrant is held to give an action on the bond of constable: *State v. Boyd*, 120 N. C. 56, 26 S. E. 700.

(2) *Where Process Unnecessary.*—A warrant is not, however, necessary in all cases to justify an officer in making an arrest, and where an arrest can be made without warrant, the fact that it was made in gratification of private malice is immaterial. The act is nevertheless an act done "in the line of" official duty: *Yount v. Carney*, 91 Iowa, 559, 60 N. W. 114; *Clancy v. Kenworthy*, 74 Iowa, 740, 7 Am. St. Rep. 508, 35 N. W. 427. Nor is it material that the arrest was without reasonable or probable cause: *Drolesbaugh v. Hill*, 64 Ohio St. 257, 60 N. E. 202.

In *Chandler v. Rutherford*, 101 Fed. 774, 43 C. C. A. 218, affirming 2 Ind. Ter. 379, 51 S. W. 981, the principle recognized, and very properly, it would seem, applied in the cases cited in the preceding was urged upon the court, but was overruled for reasons not entirely satisfactory. In that case a felony (the larceny of a horse) had been committed and a deputy United States marshal had been apprised of the fact, and that one Carver was believed, on reasonable grounds, to be the thief. Being told that Carver was in the vicinity, the deputy marshal secured a posse and started without procuring a warrant to arrest Carver. The posse, acting with this intent and without using reasonable diligence to identify the plaintiff as Carver, although believing him to be the latter, shot him. By a statute in force in Indian Territory at the time it was provided that a peace officer might arrest, "first, in obedience to a warrant of arrest delivered to him; second, without a warrant where a public offense is committed in his presence, or where he has reasonable grounds for believing that the person arrested has committed a felony." "The contention is," says Thayer, J., in delivering the opinion of the circuit court of appeals, "that, as this statute authorizes an arrest without warrant in two instances, the deputy marshal must be regarded as having acted *colore officii* in such a sense as will render the marshal and his sureties liable for the wrong committed. It will be observed, however, that no offense had been committed in the deputy marshal's presence when he attempted to arrest the plaintiff, and that such knowledge as he had of an offense having been committed was derived from hearsay. It is further noticeable that the complaint fails to show that prior to the arrest the deputy marshal had been informed that the plaintiff was Flave Carver, or that any effort was made by the officer or any member of his posse to ascertain whether he was in fact Flave Carver, who was accused of horse stealing, while it is expressly averred that the arrest was attempted without the exercise of reasonable diligence or any diligence whatever to ascertain whether or not the plaintiff was the person whom they were looking for and seeking to arrest. It is clear, therefore, under the averments of the complaint, that, if the arrest had been consum-

mated, without the use of firearms, or any unusual force or violence, the deputy marshal would have been guilty of a trespass, and could not have justified his conduct under the statute aforesaid, because, having no knowledge or information whatever as to whom the person was whom he attempted to arrest, he cannot be said to have had any ground for believing that the plaintiff had committed a felony. When an officer seeks to justify an arrest without a warrant, under a statute like the one now under consideration, and the act for which the arrest was made was not committed in his presence, he must show that he acted on information such as would justify a reasonable man in believing that the particular person arrested was guilty of felony. . . . The deputy's act on the occasion in question was not only unauthorized, but it did not have the appearance of being done in obedience to the mandate of the law; in other words, he did not act *colore officii* in any such sense or under such circumstances as will render the sureties responsible."

The effect of this reasoning is to include within the scope of an official bond only such acts as are entirely justifiable, and which, therefore, create no liability at all. The language of the supreme court of Iowa in *Clancy v. Kenworthy*, 74 Iowa, 740, 7 Am. St. Rep. 508, 35 N. W. 427, is pertinent: "But it is insisted that, as the constable is shown to have had no lawful authority to arrest plaintiff, his act was, therefore, not done in the line of his duty. In truth, his act was in the line—direction—of official duty, but was illegal, because it was in excess of his duty. In the discharge of official functions he violated his duty, and oppressed the plaintiff. This is all there is of it. If, in exercising the functions of his office, defendant is not liable for acts because they are illegal or forbidden by law, and for that reason are trespasses or wrongs, he cannot be held liable on the bond at all, for the reason that all violations of duty and acts of oppression result in trespasses or wrongs. For lawful acts in discharge of his duty he, of course, is not liable. It follows that, if defendant's position be sound, no action can be maintained upon the bond in any case."

(3) *Where Bond Covers Injury to Public Only.*—In *Alexander v. Ison*, 107 Ga. 745, 33 S. E. 657, it was held that the bond required of a city chief of police that he "well and truly demean himself in the office, . . . and well and truly account for all moneys coming into his hands by reason of said office," was not intended to furnish indemnity to individuals for wrongs done them by the chief of police, but was given for the protection of the city in its corporate capacity.

4. Acts Under Process.

A. Under Process Irregular or Void.

(1) *Seizure, etc., of Property.*—So far as furnishing any justification for the seizure of property, an execution or other process void

on its face has no force whatever. The officer is not bound to levy it, and an act done under it is no more authorized than if done without any process whatever. Where, therefore, an act to bind the sureties must be done *virtute officii*, a levy or sale under a void warrant is regarded as an extraofficial and personal trespass, not covered by the officer's official bond: *State v. Timmons*, 90 Md. 10, 78 Am. St. Rep. 417, 44 Atl. 1003. In those jurisdictions, on the other hand, where by statute or otherwise acts done *colore officii*, as they are termed, are held to be official acts in the sense that they bind the sureties on the official bond, a seizure or sale, although made under a void process, is deemed made in the assertion of a legal authority, and renders the bondsmen of the officer responsible: *Allbright v. Mills*, 86 Ala. 324, 5 South. 591; *Couch v. Davidson*, 109 Ala. 313, 19 South. 507; *Tieman v. Haw*, 49 Iowa, 312. So in *State v. Hendricks*, 88 Mo. App. 560, it was held that a sale by an officer under a warrant not directed to him was a personal trespass merely, for which his official bondsmen were not answerable; while in Massachusetts the execution of process by one officer, though it is not directed to him, is deemed an act *colore officii*, for which his sureties are responsible: *Turner v. Sisson*, 137 Mass. 191. Service by a constable of an attachment writ, which, because of the amount, he had no authority to serve, is placed upon the same ground, and binds the sureties: *Lowell v. Parker*, 51 Mass. (10 Met.) 309, 43 Am. Dec. 436. Compare, however, *Commissioners v. Sommers*, 3 Bush, 555.

Where process is void by reason of facts not appearing on its face, the sureties of the officer serving it incur no liability, since process "fair on its face" is a full protection to an officer obeying its commands: *Holdrege v. McCombs*, 8 Kan. App. 663, 56 Pac. 536. For the responsibility of official bondsmen for misappropriation by their principal of the proceeds of a levy or sale under void or irregular process, see post, III, a, 5, B.

(2) **Arrest of Person.**—An arrest of the person of an individual under process void on its face is governed by the same principles as are applicable in the case of a levy or sale of property, and in those jurisdictions in which acts *virtute officii* are deemed the only acts "official" as being within the official bond, an arrest under void process does not constitute a breach of such bond: *Allison v. People*, 6 Colo. App. 80, 39 Pac. 903; *McLendon v. State*, 92 Tenn. 520, 22 S. W. 200. In the Colorado case the invalidity of the arrest arose from the fact that the writ was not directed to the arresting officer, while in the McLendon case the writ was void because it did not run in the name of the state. Whatever the liability of the sureties for an arrest by their principal under a void warrant, the arrest and any detention because of it are, of course, illegal and the release of the prisoner so wrongfully detained can give

rise to no liability on the part of the sureties of the officers: *Apomator Co. v. Buffaloe*, 121 N. C. 37, 27 S. E. 999.

B. Seizure of Exempt Property.—Where an officer acting under a valid writ, levies on or sells property exempt from execution or sale, after the steps necessary to establish the exemption have been taken, the authorities are uniform in holding the act to be one for which the sureties on his official bond are liable: *McElhaney v. Gilliland*, 30 Ala. 183 (see *Bryan v. Kelly*, 85 Ala. 569, 5 South. 346); *Wilson v. Lowry* (Ariz.), 52 Pac. 777; *Strunk v. Ochletree*, 11 Iowa, 158; *Richardson v. Samuelson*, 45 Kan. 589, 26 Pac. 12; *Hursey v. Marty*, 61 Minn. 430, 63 N. W. 1090; *State v. Moore*, 19 Mo. 369, 61 Am. Dec. 563; *State v. Horn*, 94 Mo. 162, 7 S. W. 116; *Kriesel v. Eddy*, 37 Neb. 63, 55 N. W. 244; *Grieb v. Northrup*, 66 App. Div. 86, 72 N. Y. Supp. 481; *Scott v. Kenan*, 94 N. C. 296 (in effect overruling *State v. Brown*, 11 Ired. (33 N. C.) 141); *State v. Jennings*, 4 Ohio St. 418; *Mace v. Gaddis*, 3 Wash. Ter. 125, 13 Pac. 545. Such an act is not done *colore officii* merely, but is a type case of what are classed by the authorities as acts *virtute officii*—"within the authority of the officer, but in doing which he exercises that authority improperly or abuses the confidence which the law reposes in him." Whatever the conflict, therefore, as to the effect of acts *colore officii*, a levy on property by law exempt from execution is a breach of the official bond of a sheriff or constable. On the same principle, the sureties of such an officer are responsible for his sale of goods covered by a prior lien, where the levy was made with knowledge of the lien. And where by statute acts "under color of office" are covered by the bond, it is immaterial whether the writ under which the levy was made was regular or irregular, voidable or void, the sale being made in the assertion of a legal authority under the writ: *Couch v. Davidson*, 109 Ala. 313, 19 South. 507.

C. Seizure of Property of Stranger to Writ.

(1) **In General.**—No question connected with the liability of the sureties on the bond of an officer for acts done by him in the execution of process has given rise to more discussion than that of their responsibility for his act in levying on the property of one person process which runs against the property of another. Omitting all question of when a sheriff or constable is justified in levying on the property of one person which he finds in the possession of another, in executing a writ against the latter (see *Geo. H. Fuller Desk Co. v. McDade*, 113 Cal. 360, 45 Pac. 94), there is a conflict among the authorities as to the liabilities of the sureties on an official bond, where the principal obligor without excuse levies on the property of a stranger to the writ.

(2) **Doctrine that Sureties not Liable.**—A few states, notably New York, and to a less extent Wisconsin and North Carolina, have at

times leaned to the doctrine that such an act does not render the official bondsmen liable. With one exception, however, the law in these states may now be said to be settled the other way. In New Jersey, the view that the sureties are not liable for a levy against the property of a stranger to the writ remains, we believe, the law. The process of reasoning by which this conclusion is reached is based on the frequently mentioned distinction between acts *colore officii* and *virtute officii*. "If a sheriff, having an execution in his hands seizes the property of a stranger," it is said by Haines, J., in *State v. Conover*, 28 N. J. L. 224, 78 Am. Dec. 54, "he is a trespasser. He may be resisted notwithstanding his being a sheriff and having the execution. If he calls for assistance, he and the persons assisting are all trespassers, and may be resisted, force by force. . . . One acting under color of authority cannot justify the act. He is not acting officially. . . . Where there is no authority there is no office and the act cannot be *virtute officii*. . . . For such unauthorized act the sureties never assumed any responsibility." The reasoning here employed is subject to the same objection as that hereinbefore urged in another connection (III, a, 3, B, (2)). It treats those acts only as official which are justifiable, and which therefore can give rise to no liability at all. The case is, however, opposed to the overwhelming weight of authority.

As already suggested, in a few states, conflicting cases are to be found relating to the liability of sureties for a levy by their principal on the property of a stranger to the process. New York presents the most conspicuous example of this, but the law of that state may perhaps be regarded as settled in maintaining the liability of sureties for such an act. It is true that the latest case decided by the court of appeals of that state held the sureties not responsible for the erroneous levy (*People v. Lucas*, 93 N. Y. 585, reversing 25 Hun, 610), but the decision went on the very restricted language of the bond then before the court. The opinion expressly disclaimed any intention of overruling *People v. Schuyler*, 4 N. Y. 173, which settled the general liability of the sureties in cases of levies against the property of a stranger; and subsequent cases (decided in the intermediate courts of the state) have adhered to this latter view: See *People v. Schuyler*, 4 N. Y. 173 (overruling *Ex parte Reed*, 4 Hill, 572); *Dennison v. Plumb*, 18 Barb. 89; *Hanger v. Bernstein*, 7 Daly, 340; *Bishop v. Mosher*, 20 N. Y. Supp. 594, 65 Hun, 519 (distinguishing *People v. Lucas*, 93 N. Y. 585); *Berry v. Schaad*, 63 N. Y. Supp. 349, 50 App. Div. 132 (reversing on this point, 59 N. Y. Supp. 551, 28 Misc. Rep. 389, and also distinguishing *People v. Lucas*, 93 N. Y. 585); *People v. Lucas*, 25 Hun, 610 (reversed, in 93 N. Y. 585).

In Wisconsin a few of the earlier cases leaned toward the view that the sureties were not liable for an erroneous levy of the kind

under consideration: *State v. Mann*, 21 Wis. 684; *Taylor v. Parker*, 43 Wis. 78. But the later decisions in that state have placed it in line with the weight of authority: *Bishop v. McGillia*, 80 Wis. 575, 27 Am. St. Rep. 63, 50 N. W. 779; *Dishneau v. Newton*, 91 Wis. 199, 64 N. W. 879. So, also, in North Carolina a dictum occurs in an early case (*State v. Brown*, 11 Ired. (N. C.) 141), to the effect that "the books are full of cases where sheriffs have, under an execution against one man, taken the goods of another; but in no instance have the sureties been held responsible." This can, however, hardly be said to have amounted to a holding to that effect, and the law of North Carolina is otherwise: *Martin v. Buffaloe*, 128 N. C. 305, 83 Am. St. Rep. 679, 38 S. E. 902.

In *Lammon v. Fensier*, 111 U. S. 17, 4 Sup. Ct. Rep. 286, other states are mentioned as having maintained the view of nonliability in the sureties, among them being Alabama, Indiana and Mississippi, while in *National Bank of Redemption v. Rutledge*, 84 Fed. 400, Tennessee is mentioned as possibly taking this view. The cases cited in support of these statements are, however, all plainly distinguishable from the case of a levy against a stranger to the writ, and, with the exception already considered of New Jersey, it is doubtful whether the liability of the sureties for such an act is now anywhere denied.

(3) **Weight of Authority—Sureties Liable.**—In most of the cases this liability is placed upon the ground that a levy against the goods of a person other than that named in the writ is an act *colore officii*, and is, therefore, under one theory an act rendering the sureties liable. In those states, however, in which acts merely *colore officii* are deemed unofficial acts for which the sureties are not answerable, the particular act now under consideration is regarded as an act done *virtute officii*, or as forming a class by itself. Whatever the differences as to the true reason for the rule, however, the rule itself is sustained by a long list of authorities: *Albright v. Mills*, 86 Ala. 324, 5 South. 591; *Van Pelt v. Littler*, 14 Cal. 194; *Newman v. People*, 4 Colo. App. 46, 34 Pac. 1006; *United States v. Hine*, 3 McAr. (D. C.) 27; *Town of Norwalk v. Ireland*, 68 Conn. 1, 35 Atl. 804; *Jefferson v. Hartley*, 81 Ga. 716, 9 S. E. 174; *Wickler v. People*, 68 Ill. App. 282; *Hawkins v. Thomas*, 3 Ind. App. 399, 29 N. E. 157; *Keck v. State*, 12 Ind. App. 119, 39 N. E. 399; *Charles v. Haskins*, 11 Iowa, 829, 77 Am. Dec. 148; *Commonwealth v. Stockton*, 5 T. B. Mon. (Ky.) 192; *Harris v. Hanson*, 11 Me. 241; *State v. Brown*, 54 Md. 318; *Greenfield v. Wilson*, 13 Gray, 384; *Turner v. Sisson*, 137 Mass. 191; *People v. Mersereau*, 74 Mich. 687, 42 N. W. 153; *Hursey v. Marty*, 61 Minn. 30, 63 N. W. 1090; *State v. Fitzpatrick*, 64 Mo. 185; *State v. Edmundson*, 71 Mo. App. 172; *Noble v. Himeo*, 12 Neb. 193, 10 N. W. 499; *Turner v. Killian*, 12 Neb. 580, 12 N. W. 101; *Walker v. Wonderlick*, 33 Neb. 504, 50 N.

W. 445; *Wonderlick v. Walker*, 41 Neb. 806, 60 N. W. 103; *Thomas v. Markman*, 43 Neb. 823, 62 N. W. 206; *Maul v. Drexel*, 55 Neb. 446, 76 N. W. 163; *State v. Jennings*, 4 Ohio St. 418; *Dysart v. Lurty*, 3 Okla. 601, 41 Pac. 724; *Lowe v. City of Guthrie*, 4 Okla. 287, 44 Pac. 198; *Brunott v. McKee*, 6 Watts & S. (Pa.) 513; *Holliman v. Carroll*, 27 Tex. 23, 84 Am. Dec. 606; *Marquis v. Willard*, 12 Wash. 528, 50 Am. St. Rep. 906, 41 Pac. 889; *Fish v. Nethercutt*, 14 Wash. 582, 53 Am. St. Rep. 892, 45 Pac. 44; *Lammon v. Fensier*, 111 U. S. 17, 4 Sup. Ct. Rep. 286; *National Bank of Redemption v. Rutledge*, 84 Fed. 400. For the cases in New York, North Carolina and Wisconsin, see preceding paragraphs.

D. Arrest, etc., of Stranger to Writ.—The same principle applies where in endeavoring to effect the arrest of one person an officer, acting under writ, mistakes another for the person wanted, and arrests him, or in the attempt to make the arrest injures or kills him. This, the cases quite uniformly hold, constitutes a breach of the official bond: *Johnson v. Williams*, 23 Ky. Law Rep. 658, 63 S. W. 759; *Huffman v. Kopplekom*, 8 Neb. 344, 1 N. W. 243; *Kopplekom v. Huffman*, 12 Neb. 95, 10 N. W. 577; *West v. Cabell*, 153 U. S. 78, 14 Sup. Ct. Rep. 752. Compare, however, *Chandler v. Rutherford*, 101 Fed. 774, 43 C. C. A. 218, affirming 2 Ind. Ter. 379, 51 S. W. 981.

Whether the liability in such case depends upon negligence or is absolute is a question on which the cases are not agreed. In the two Nebraska cases above cited, a prisoner in the custody of a sheriff under valid process escaped, and, while attempting to prevent the escape of the plaintiff, whom he had arrested, erroneously believing him to be the escaped prisoner, shot the plaintiff. In the report in *Kopplekom v. Huffman*, 12 Neb. 95, 10 N. W. 577, it was held that the liability of the sheriff and his bondsmen depended upon whether he had acted with a "high degree of care and diligence in ascertaining whether he had the right or wrong man," or "whether in what he did in and about the arrest and attempted detention of the defendant in error he was wanting in that reasonable care and caution which is due to the safety and rights of the innocent." In the Kentucky case, on the other hand, where a deputy sheriff killed a person whom he erroneously believed the defendant in a warrant of arrest, while trying to prevent his escape, it was said: "If he [sheriff] has a warrant against one, and under it arrests another, he is liable on his bond for the tort thus committed. He cannot justify the wrongful arrest by showing he believed, and had reasonable ground for believing, that he was executing it upon the party named in it. If he cannot in that way justify a wrongful arrest, much less should he be permitted to justify the killing of another by showing that he had probable cause for believing that he was shooting at the party whom he

was authorized to arrest. The law which gives an officer the right to kill an escaping felon certainly requires him to know that it is the felon, not an innocent party, whose life he is attempting to take": *Johnson v. William*, 23 Ky. Law Rep. 658, 63 S. W. 759. With authority thus divided, principle would seem to favor the view taken by the Kentucky case. A trespass, especially when it takes the form of a homicidal assault, is hardly excused, on principle at least, by the plea that it was made in the exercise of due care.

E. In Excess of Authority Conferred by Process.—Where the officer acts in the line of his duty, but in excess of his authority, the sureties on the official bond are liable. Since civil process furnishes no justification or authority to force the outer door of a dwelling, an officer who does this in the execution of civil process acts in excess of his authority merely: *State v. Beckener*, 132 Ind. 371, 32 Am. St. Rep. 257, 31 N. E. 950. Most of the cases of excess of authority occur, however, in cases where in the execution of criminal process injury is done the party whom it is sought to arrest or recapture. Such are the cases, for instance, in which an officer, to prevent the escape of a misdemeanor, and in excess of his authority, inflicts bodily injury upon or kills the one attempting to escape. For such acts the sureties of the officer are liable: See *Thomas v. Kinhead*, 55 Ark. 502, 29 Am. St. Rep. 68, 18 S. W. 854; *Brown v. Weaver*, 76 Miss. 7, 71 Am. St. Rep. 512, 23 South. 388; *Stephenson v. Sinclair*, 14 Tex. Civ. App. 133, 36 S. W. 137. A review of the authorities in this general connection in the monographic note to *Brown v. Weaver*, 71 Am. St. Rep. 519-522, renders their treatment here unnecessary.

F. Injury to Property in Custody.—Where an officer has the custody of goods under an attachment or other writ, it is his duty to use reasonable care in the preservation and protection of them. Whether his duty goes beyond this, and is absolute, rendering him liable for their loss in the absence of all negligence, is a question upon which the authorities are, it seems, in conflict: See *Cumberland Co. v. Pennell*, 69 Me. 357, 366, 31 Am. Rep. 284. As to his liability and that of the sureties on his official bond for a loss or injury caused by his negligence there is no doubt. Where, therefore, an officer seized a ripe fruit crop and, refusing to let it be picked, permitted it to rot, he was held liable on his bond: *State v. Fowler*, 88 Md. 601, 71 Am. St. Rep. 452, 42 Atl. 201; and negligence on his part in threshing wheat held under an attachment is likewise a breach of his bond: *Holdredge v. McCombs*, 8 Kan. App. 663, 56 Pac. 536. His sale of a stock of merchandise as "perishable," when it is in fact not so, is an act for which his sureties are responsible: *Work v. Kinney* (Idaho), 51 Pac. 245. And, in general, his official bond covers any injury or loss to property held

by him under attachment, which results from his negligence: *Wilowski v. Hern*, 82 Cal. 604, 23 Pac. 132; *Tieman v. Haw*, 49 Iowa, 312; *Linokey v. Peters etc. Co.*, 66 Miss. 471, 14 Am. St. Rep. 375, 5 South. 632; or wanton destruction of it: *Governor v. Hancock*, 2 Ala. 728. In *Tieman v. Haw*, 49 Iowa, 312, it is held immaterial that there was no legal authority for the writ under which the property was held, where the officer assumed to act under color of the warrant.

G. Injury to Person in Custody.—In *State v. Wade*, 87 Md. 529, 40 Atl. 104, it was held that unless a sheriff maliciously injures a prisoner, or aids and abets others in injuring him, he is not liable on his bond. In that case it was charged that through the gross negligence of the sheriff in not furnishing sufficient protection to a prisoner in his custody, a mob was enabled to and did lynch the prisoner. The sureties were held not responsible, and the opinion of the court, if it does not expressly hold, at least very strongly implies, that in the absence of malice on the part of the sheriff no such action can be maintained.

The weight of authority is, however, the other way. A sheriff is bound to use due care in the preservation of property in his custody by virtue of his office. "Is a helpless prisoner in the custody of a sheriff," *Baker, J.*, pointedly asks in *State v. Gobrin*, 94 Fed. 48, "less entitled to his care than a bale of goods or a dumb beast?" And continues: "The law is not subject to any such reproach. When a sheriff, by virtue of his office, has arrested and imprisoned a human being, he is bound to exercise ordinary and reasonable care, under the circumstances of each particular case, for the preservation of his life and health. This duty of care is one owing by him to the person in his custody by virtue of his office, and for a breach of such duty he and his sureties are responsible in damages on his official bond." Such is undoubtedly the true rule on principle and on authority as well. Under it a sheriff and the sureties on his bond are liable if by his negligent failure to protect a prisoner the latter falls a victim to mob violence: *Appeal of Jenkins*, 25 Ind. App. 532, 81 Am. St. Rep. 114, 58 N. E. 560; *Hixon v. Cupp*, 5 Okla. 545, 49 Pac. 927; *Asher v. Cabell*, 50 Fed. 818, 1 C. C. A. 693; *State of Tennessee v. Hill*, 60 Fed. 1005, 9 C. C. A. 326. In *Governor v. Pearce*, 31 Ala. 465, it was held that the sureties of a sheriff were not liable for the ill-treatment by a jailer of a slave committed to the custody of the sheriff by a justice of the peace, who had no jurisdiction to order the commitment. A sheriff has, it is held, in *State v. Clausmier*, 154 Ind. 599, 77 Am. St. Rep. 511, 57 N. E. 541, rightful authority to take the photograph and measurements of a prisoner, where no force or violence is used and where it is deemed necessary to secure the prisoner's safekeeping and to facilitate recapture in case of escape. If, however, the

sheriff sends out copies of these photographs to other police departments, his act in so doing is extraofficial, and his sureties are not responsible for it or for libelous matter written on such photographs and descriptions.

The bond of a sheriff is not, it has been held by the supreme court of the United States, liable on his bond for a failure to preserve the public peace, whereby a citizen sustains injury. As a peace officer, his duty to keep the peace is one due to the public generally and not owed to some particular individual, and for the breach of such a duty he is answerable to the public and not to any private citizen to whom he owes no particular duty: *South v. Maryland*, 18 How. (U. S.) 396. See, in this general connection, the monographic note to *Brown v. Weaver*, 71 Am. St. Rep. 519-522, on the liability of the sureties of a sheriff for personal injury inflicted by the officer.

H. Escape.—At common law, a sheriff is liable for an escape, though an armed mob break the jail and effect a rescue, the theory being that "the sheriff has the power of the county at his back to aid him in the execution of precepts, and 'the law supposes the posse to be a sufficient defense against a rescue, and that no force is able to resist successfully the sheriff and his posse'": *Cumberland County v. Pennell*, 69 Me. 357, 31 Am. Rep. 284. The United States may, it is held, sue, where permitted by a state statute, in the name of the state, and recover on the bond of a sheriff for the escape of a federal prisoner: *State of Tennessee v. Hill*, 60 Fed. 1005, 9 C. C. A. 326. Where an escape has taken place the bond of the delinquent officer is breached, although he has the prisoner in court on the return day: *United States v. Brent*, 1 Cranch C. C. 525, Fed. Cas. No. 14,639.

I. Improper Release of Person or Property in Custody.—Where a sheriff or constable has taken property into his custody under attachment or other process, it is his duty to hold it until by the order of a court of competent jurisdiction or in some other legal manner the levy is released, and then it becomes his duty to deliver the property to the rightful owner. If, therefore, he prematurely releases the property, he makes a default in his official capacity and his bond is breached: *State v. Atkinson* (Ark.), 13 S. W. 415; *Cooper v. Mowry*, 16 Mass. 5; *Butler v. Williams*, 22 Miss. (14 Smedes & M.) 54; *Halpin v. Hall*, 42 Wis. 176 (see, also, *Brinster v. Gavin*, 127 Ala. 317, 28 South. 410). So a refusal to release the property when by the termination of the action in the owner's favor, or for any other reason, the force of the levy has ceased, is likewise a breach of the officer's official bond: *San Yuen v. McMann*, 99 Cal. 497, 34 Pac. 80; *Dennie v. Smith*, 129 Mass. 143; *Levy v. McDowell*, 45 Tex. 220. Where, during the time an attachment is in force, the property attached is sold and notice of

the sale given the attaching officer, he is bound to deliver the property, on the release of the levy, to the rightful owner, and becomes liable on his bond if he delivers to the vendor: *State v. Fitzpatrick*, 64 Mo. 185.

J. Return of Process.

(1) **Failure to Return.**—The due return of process is as much a part of an officer's duty in the execution of process as is the seizure of property under it. A failure, therefore, to make return of execution or other process on the day fixed as the return day is a breach of the official bond of a sheriff or constable: *Noble v. Whitehead*, 45 Ala. 361; *Norris v. State*, 22 Ark. 524; *Herr v. Atkinson*, 40 Ark. 377; *Atkinson v. Herr*, 44 Ark. 174; *Jett v. Shinn*, 47 Ark. 373, 1 S. W. 693; *Wilson v. Young*, 58 Ark. 593, 25 S. W. 870; *Babka v. People*, 73 Ill. App. 246; *Carpenter v. Doody*, 1 Hilt. (N. Y.) 465; *Sloan v. Case*, 10 Wend. 370, 25 Am. Dec. 569; *Davis v. Dyer*, 37 Tenn. (5 Sneed) 680. Compare *United States v. Williams*, Fed. Cas. No. 16, 714, 5 Cranch C. C. 400. The writ must be a valid process; no liability can accrue from failure to return a writ void on its face: *Putnam v. Traeger*, 66 Ill. 90; *Hawkins v. Commonwealth*, 1 T. B. Mon. 144; but a mere irregularity, such as the omission of the clerk's signature, does not render the writ void, and furnishes no excuse for a failure to return: *Jett v. Shinn*, 47 Ark. 373, 1 S. W. 693.

The insolvency of the judgment creditor (*Noble v. Whetstone*, 45 Ala. 361; *Atkinson v. Herr*, 44 Ark. 174), or the fact that no money has been received on the process, does not render a return unnecessary: *Sloan v. Case*, 10 Wend. 370, 25 Am. Dec. 569 (distinguishing *Warner v. Racey*, 20 Johns. 74). Nor does the fact that the judgment creditor hindered or prevented a sale avoid liability for a failure to return process: *Norris v. State*, 22 Ark. 524; *Jett v. Shinn*, 47 Ark. 373, 1 S. W. 693. Indorsement of return on an execution does not take the place of an actual return: *Wilson v. Young*, 58 Ark. 593, 25 S. W. 570; *Atkinson v. Herr*, 44 Ark. 174; nor does the fact that the clerk's office was closed, and a return within the statutory period thereby prevented, excuse a failure to make a return as soon thereafter as possible: *Atkinson v. Herr*, 44 Ark. 174. In *Graves v. Bulkley*, 25 Kan. 294, 37 Am. Rep. 249, it is held that the receipt by the execution creditor of the fruits of an execution amounts to a waiver of a neglect on the part of the officer to make a return within the prescribed period, and such creditor cannot afterward hold him or his sureties for the neglect in making the return. And, as a general rule, there can be recovery by an execution plaintiff for a neglect by the officer to return process as required by law, where the plaintiff himself has authorized the delay: *Robinson v. Coker*, 11 Ala. 466; *State v. Parchmen*, 40 Tenn. (3 Head) 611. See, also, *Collier v. Stoddard*, 19 Ga. 274.

(2) **False Return.**—In *State v. Hughes*, 19 Ind. App. 266, 49 N. E. 393, an action was brought on the bond of a sheriff, for in his act in making a false return to the effect that service of summons had been made on plaintiff, who was at the time defendant in an action on a promissory note, as a consequence of which false return judgment was taken against him. It was held that the action was maintainable only on a showing of damage to the plaintiff, and where it appeared that he had no defense to the former action no damage was shown.

5. Proceeds of Levy, etc.

A. Received Without Process.

(1) **General Rule.**—As a general rule, the liability of the sureties of a public officer for money received by him as the proceeds of a levy or sale depends upon the same considerations as does their liability for his act in making the levy or sale. In both cases their responsibility hinges upon the official or nonofficial character of the levy or sale, since if the levy was official, the officer's receipt of the proceeds is, of course, of the same nature. In line, therefore, with the cases holding that a levy or sale made by an officer without legal process of any kind in his hands is a personal trespass, and not an act for which his bond is answerable (see *supra*, III, a, 3, A), it is held that his sureties are likewise not responsible for his misappropriation of the proceeds of such levy or sale. The proceeds of the trespass stand on no different ground than the trespass itself, so far as the liability of the sureties is concerned: *Babs v. Thompson*, 3 Stew. & P. 385; *Best v. Johnson*, 78 Cal. 217, 12 Am. St. Rep. 41, 20 Pac. 415; *Greenwell v. Commonwealth*, 78 Ky. 320; *United States v. Cranston*, Fed. Cas. No. 14,889, 3 Cranch C. C. 289. In those states, however, in which a levy, although without process, if made under claim of authority, is apparently regarded as an official act covered by the bond (see *supra*, III, a, 3, A), it seems that the proceeds of such a levy would necessarily be regarded as held officially, and a misappropriation thereof would render the officer's bondsmen responsible. In Tennessee this rule was established by an express provision of statute: *State v. Gilmore*, 3 Sneed, 503; *Haynes v. Bridge*, 1 Cold. 33. Compare *State v. McCallum*, 2 Baxt. 102.

(2) **As Agent for Collection.**—In a few jurisdictions the official bond of a sheriff or constable is by statute extended to cover the collection of and accounting for claims placed in his hands to collect. These statutes do not ordinarily make it the duty of the sheriff to receive all claims offered him for collection, but simply extend the operation of the bond to the diligent collection and faithful accounting for such as he may assume to collect: *Williams v. Williamson*, 6 Ired. 281, 45 Am. Dec. 494; and in *Commonwealth*

v. Sommers, 3 Bush, 555, it was held that the statute there involved did not cover the collection of claims by a constable where he assumed to collect claims of an amount beyond the jurisdiction of the courts, whose precepts a constable could serve.

B. Received Under Levy of Irregular or Void Process.—Where a warrant is not void, but merely irregular in some particular, money received on it is held to be received in an official capacity, and for a misappropriation of it, the sureties of the officers are liable: *People v. Dunning*, 1 Wend. 16. The cases differ, however, as has been noted (*supra*, III, a, 4, A, (1)), with reference to the liability of sureties for a levy under void process, and it is quite probable that in determining the liability of the sureties for the misappropriation of the proceeds of such levy the same principles would control. In those states, therefore, in which a levy under void process is deemed an extraofficial act or mere personal trespass, money received as a result of it would, it seems, likewise to be regarded as held by the officer in a personal capacity, and not within the purview of his official bond, while in those jurisdictions where levies under void process are considered acts *colore officii* and are held to render the sureties answerable, they would in all probability be held equally responsible for the proper application by the officer of the proceeds of such levies or sales made under them: See *Williamston v. Willis*, 15 Gray, 427.

C. Received Under Levy of Defunct Process.—Where execution is issued returnable at a certain time, it is valid to authorize a levy only up to the time at which it should be returned. Thereafter, it is *functus officio* so far as authorizing the seizure of property. Accordingly, it is held that money received subsequent to the return day on such a writ is not received in an official capacity, and for its misappropriation the official bondsmen of an officer are not responsible: *Bobo v. Thompson*, 3 Stew. & P. (Ala.) 385; *Farmers' Bank v. Reid*, 3 Ala. 299; *Dean & Johnson v. Governor*, 13 Ala. 526; *Chapman v. Cowles*, 41 Ala. 103, 91 Am. Dec. 508; *Turner v. Collier*, 51 Tenn. (4 Heisk.) 89; *Virginia v. Wise*, 1 Cranch C. C. 142, Fed. Cas. No. 16,972. Except in Nebraska, however, the arrival of the return day of the writ does not prevent proceedings subsequent to the levy and necessary to dispose of property previously levied on (see *Freeman on Executions*, 3d ed., III, 353), and money received by a sheriff or constable after the return day, but as proceeds of the sale of property levied on before that date is received by him in his official capacity, and is covered by his official bond: *Evans v. Governor*, 18 Ala. 659, 54 Am. Dec. 172; *Dennis v. Chapman*, 19 Ala. 29, 54 Am. Dec. 186.

D. Received Under Valid Levy.

(1) **In General.**—It is a proposition too plain to require or justify the citation of authorities that a sheriff or constable is liable

on his official bond for his failure to pay over to the person entitled money received by him on valid process, or which he was by law required to receive. This applies not only to the payment of money due attachment or execution creditors (which is, of course, the most frequent instance of its application), but is equally applicable to moneys received as fees of other officers, and which he was by law bound to collect: *Hagood v. Blythe*, 37 Fed. 249; to money received for the redemption of property: *County Commra. of Ramsey Co. v. Brisbin*, 17 Minn. 451, etc. So a failure to apply to the prior lien of a docketed judgment money held as the proceeds of a sale, where he at the time held a writ of execution, issued on such judgment, is a breach of his bond: *Titman v. Rhyne*, 89 N. C. 64. See, also, monographic note to *Commonwealth v. Cole*, 46 Am. Dec. 510-512.

(2) **Effect of Tender and Refusal.**—Where a sheriff or constable holding money in his hands belonging to a third person duly makes a tender of such money, if such person refuses to receive it, the sureties are discharged. This was held in *Hull v. Chapel*, 77 Minn. 159, 79 N. W. 669, in which the court expresses its disapproval of the contrary holding in *State v. Alden*, 12 Ohio, 59, and says: "The refusal of the creditor to receive the money is a fraud on the surety which exposes him to greater risk after the debt is due and payable, the creditor cannot, by his unjustifiable refusal to accept payment from the principal, compel the surety to continue responsible for the future acts of the principal as his debtor or bailee of the money." The fact that the bond of a public officer constitutes a continuing guaranty of the fidelity of the latter does not, in the opinion of the court, alter the principle. Where the refusal of the tender is by a public officer acting for the state or county, a question whether the public could have its rights thus disposed of by an officer might arise. "But the breach here complained of was of a duty owing to a private individual, and one in which no one but he had any interest. As respects such a liability, we fail to see why the same acts on the part of the creditor which would release a surety on a private bond should not also release a surety on a sheriff's official bond." The case is an excellently considered one, and its view seems preferable to that of the Ohio case: *State v. Alden*, 12 Ohio, 59.

In *Hill v. Kemble*, 9 Cal. 71, a constable offered to pay to the execution creditor money received on execution, and was told that he might use it. It was held that it thereupon became a private debt, for the nonpayment of which his sureties were not liable. In *Boice v. Main*, 4 Denio, 55, on the other hand, it was held that the mere yielding assent by the execution creditor, without consideration, to a temporary delay in paying money collected on an execution did not discharge the constable's sureties from liability for

his subsequent failure to pay. The case is distinguishable, however, since, according to the court, "there was no evidence that the constable offered to pay the money, provided the plaintiff would assent to his request, nor any pretense that the plaintiff loaned the money to him."

E. Received by Arrangement with Debtor.

(1) **Deposit to Stay Execution.**—Where the law authorizes an officer to take the bond of a judgment debtor to stay execution, if, instead of taking a bond the officer takes a deposit of money, he is deemed to do so by virtue of a private contract, and not in his official capacity, and his sureties are not liable for his misappropriation of the money so received. The principal case (*Feller v. Gates*, 40 Or. 543, ante, p. 492, 67 Pac. 416) is of this nature, and the conclusion there reached is in accord with the authorities generally: *De Sisto v. Stimmel*, 69 N. Y. Supp. 431, 58 App. Div. 486; *Ellis v. Long*, 8 Ired. (N. C.) 513; *People v. Hilton*, 36 Fed. 172. Compare *Broughton v. Haywood*, 61 N. C. (Phill.) 380; *Cressy v. Gierman*, 7 Minn. 398.

(2) **Of Property Other than Money.**—On the same principle it is held that where a sheriff or constable is authorized to receive money only in satisfaction of a debt on which process has issued, his receipt of other property is an extraofficial act, and neither the judgment debtor who is compelled again to pay (*Brown v. Mosely*, 11 Smedes & M. (19 Miss.) 354), nor the execution creditor can recover for the misappropriation of such property: *Haynes v. Bridge*, 1 Cold. 33; *Draper v. State*, 1 Head (Tenn.), 263. Compare, however, *Meherin v. Saunders*, 110 Cal. 463, 42 Pac. 966. When promissory notes are received by a sheriff as consideration for land sold at judicial sale and in accordance with the law, they are, of course, received by him in his official capacity, and his sureties are liable for his conversion of such notes: *Brobst v. Skillen*, 16 Ohio St. 382, 88 Am. Dec. 458.

(3) **In General.**—Where money or other property is received by a sheriff under a private arrangement with the judgment debtor as to its disposition, it is not received by him as an officer, but as an agent of the debtor, and his sureties are in no way answerable for his defaults of the money or property. Thus, in *Schloss v. White*, 16 Cal. 65, the plaintiff levied an attachment against certain goods, which were subsequently attached by other creditors. By arrangement between the sheriff and the plaintiff, the sheriff agreed to hold the proceeds realized from a sale of the goods to pay any judgment which plaintiff might recover in a replevin suit brought against him (the sheriff) by plaintiff. Instead, he paid the money into court, and it was applied to the claims of the other attaching creditors, plaintiff having previously released the lien of his attachment. The sureties on the sheriff's official bond were held

not liable. Neither the contract nor his default in performing it was an official act. So it is held that where the parties introduce private matters into a "settlement" with the sheriff for the sum due on an execution in his hands, his refusal to repay an amount received by mistake in excess of the amount rightly due him is not a breach of his official bond: *State v. Tapscott*, 68 N. C. 300. See, also, in this connection, *Boone Co. Bank v. Eoff*, 66 Ark. 321, 50 S. W. 688; *Knowlton v. Bartlett*, 1 Pick. 271.

6. Taking Security.

A. Failure to Take Bail.—At common law it seems to have been the rule that, where a sheriff was given a writ of *capias ad respondendum*, he discharged his duty if he had the body of the debtor at the return of the writ, and in the meantime he might imprison him or not, as he saw fit: *Governor v. Jones*, 9 N. C. 359. Accordingly, the mere release of a debtor before the return of the writ and without taking bail did not of itself constitute a breach of the official bond of the sheriff: *Governor v. Jones*, 2 Hawks (N. C.), 359. Where, however, a statute makes the sheriff special bail where he fails to take bail, his sureties are liable for his failure to pay the bail: *People v. Dikeman*, 4 Keyes (N. Y.), 93, 3 Abb. Ct. App. Dec. 50; *Barker v. Munroe*, 15 N. C. 412; although even under such a statute the mere failure to take bail does not in itself give rise to any liability on the bond: *Barker v. Munroe*, 15 N. C. 412. If a sheriff releases a debtor on his depositing a sum of money, the money deposited is received not in the officer's official capacity, but by virtue of a private contract, and his failure to repay the sum is not a matter which concerns his sureties, who have agreed to become answerable for his official defaults only: *State v. Long*, 8 Ired. (30 N. C.) 415; *Ellis v. Long*, 30 N. C. 513; *United States v. Moore*, 2 Brock, 317, Fed. Cas. No. 15,802.

B. When Acts Deemed Judicial.—The judicial functions of an officer and his proper performance of them are, as we have seen, (II, e) ordinarily not within the purview of his official bond. Accordingly, it is held in *Scott v. Ryan*, 115 Ala. 587, 22 South. 284, that the act of a sheriff in erroneously fixing the penalty of a forthcoming bond which it is his duty to take, and in misjudging the solvency of the sureties thereon does not render his official bondsmen liable. In performing the acts complained of he was compelled to exercise a discretion, and acted judicially. Where, however, the act was one not involving discretion, the default of a sheriff in taking security is as much a breach of the bond as his failure to execute process. Thus, where he takes a bond which does not run to the plaintiff as required by statute (*Hughes v. Newsom*, 86 N. C. 425), or where he fails to have the sureties on a bond justify, his failure is in reference to the performance of a ministerial act, and renders him and his sureties on the official bond liable: *People v. Lee*, 65

Mich. 557, 32 N. W. 817; Barton v. Shull, 62 Neb. 570, 87 N. W. 322; Magnus v. Woolery, 14 Wash. 43, 44 Pac. 130. In Nebraska it is held that if an officer is negligent in determining the sufficiency of the sureties on a replevin bond, he is liable regardless of his good faith: Shull v. Barton, 56 Neb. 716, 71 Am. St. Rep. 698, 77 N. W. 132, 58 Neb. 742, 79 N. W. 732; Barton v. Shull 62 Neb. 570, 87 N. W. 322. In a very recent case in Georgia (Hall & Brown Co. v. Barnes, 115 Ga. 945, 42 S. E. 276) it was held that in an action of trover against a corporation, the sheriff was not authorized to arrest the officers of the corporation, and not being able to arrest a corporation, could not be held answerable on his official bond for failure to require a bond for the forthcoming of the property. "The giving of the bond is a voluntary act on the part of the defendant in the bail process. He may give bond or not, as he chooses, and the sheriff has no authority to force him to give bond. The sheriff's authority is limited to seizing the property or arresting the defendant unless a bond is given. When, in the case now under consideration, the defendant corporation refused to give bond, there was no one whom the sheriff could arrest and imprison, and therefore he cannot be held liable for a failure to do an act which it was illegal for him to do."

7. **Acts of Deputies.**—So far as the liability of the sureties of a sheriff for the acts of the latter's deputies is concerned, the principles controlling are those applicable where the default is by the sheriff himself. So far as such acts are official, they are covered by the official bond of the sheriff. So far as they are extraofficial, they stand upon the same ground as the personal acts of the sheriff himself, and like these are not within the purview of the bond: See, in this general connection, Mathis v. Carpenter, 95 Ala. 156, 36 Am. St. Rep. 187, 10 South. 341; People v. Otto, 77 Cal. 45, 18 Pac. 869; Chandler v. Rutherford, 2 Ind. Ter. 379, 51 S. W. 981; State v. Moore, 19 Mo. 369, 61 Am. Dec. 563; Dysart v. Lurty, 3 Okla. 601, 41 Pac. 724; Dishneau v. Newton, 91 Wis. 199, 64 N. W. 879; monographic notes to Commonwealth v. Cole, 46 Am. Dec. 506, 517, and Campbell v. Phelps, 11 Am. Dec. 145, and references made in note to Mathis v. Carpenter, 36 Am. St. Rep. 190.

8. Acts in Ex-officio or Appointive Capacities.

A. As Tax Collector.

(1) **Where No Separate Bond Required.**—The functions, aside from such as are ordinarily incident to the office, with which a sheriff is ex-officio most frequently clothed, are those in the exercise of which he performs the duties of a tax collector. The liability of the sureties on the general official bond of a sheriff, constable or marshal for defaults in his duty of collecting and paying over the taxes, depends upon the application of general principles

already discussed. Where but one bond is given covering the faithful performance of the officer's duties as sheriff, etc., this is held to cover his acts as ex-officio tax collector: *People v. Edwards*, 9 Cal. 286; *Redwood v. Grimmenstein*, 68 Cal. 512, 9 Pac. 560; *State v. Matthews*, 57 Miss. 1; and if an additional bond for his acts in the latter capacity, while authorized, is not required by law to be taken, if executed it is cumulative security only. The general bond remains liable: *State v. Harney*, 57 Miss. 863.

(2) *Where Separate Bond Required.*—On the other hand, in line with the general principle (*supra*, II, c, 1), where in addition to the general official bond required of the officer as a sheriff, he is required by law to give a separate bond as tax collector, his general bond does not cover his duties as collector of revenue: *Christian v. Ashley Co.*, 24 Ark. 142; *People v. Burkhardt*, 76 Cal. 606, 18 Pac. 776; *Cooper v. People*, 85 Ill. 417; *Elliot v. Kitchen*, 14 Bush, 289; *Crumpler v. Governor*, 12 N. C. 52; *Columbia County v. Massie*, 81 Or. 292, 48 Pac. 694. See, also, *supra*, and cases cited.

In *White v. East Saginaw*, 43 Mich. 567, 6 N. W. 86, it is held that the sureties on the bond of a sheriff are not answerable for his acts in reference to the collection of taxes where this last was a duty imposed subsequently to the execution of the bond. Such duties are not germane to those of a sheriff generally, and are not deemed to have been within the contemplation of the sureties on executing the bond. In *Marion School Dist. v. Donohue*, 7 Pa. Co. Ct. 264, it was held that the official bond of a constable covered his defaults as collector of school taxes, where he had been appointed as provided by law, for this purpose, on the school directors failing to procure another person.

B. *In General—As Trustee, Treasurer, etc.*—On the same principle where, by statute, if the trustee named in a deed of trust refused to act, the parties thereto might by appropriate procedure secure the appointment of the sheriff to act in the place of the recalcitrant trustee, the sureties on his general official bond are deemed to sign with this contingency in mind, and are responsible for his acts as a trustee appointed in accordance with the statute: *State v. Griffith*, 63 Mo. 545; *State v. Taylor*, 6 Mo. App. 277. Where no such statute exists, however, the parties to a deed of trust cannot, by making the sheriff of the county trustee in case the person named as such fails to act, render his sureties liable for his delinquencies as trustee: *State v. Davis*, 88 Mo. 585. Where a sheriff is ex-officio county treasurer, the sureties on his official bond are responsible for his failure or refusal to pay warrants duly presented for payment, and for which funds were available, or if funds were not available, to mark the warrants "presented for payment": *Spurlock v. State*, 52 Fed. 882, 3 C. C. A. 151; and if he converts warrants so presented, it is undoubtedly an official act and a breach of his

bond, although they were sent to him indorsed for collection to him. This fact did not make him the agent of the owner of the warrants: *State v. McGuire*, 46 W. Va. 328, 76 Am. St. Rep. 822, 83 S. E. 313.

b. Tax Collectors.

1. **Failure to Collect.**—The primary duty of a tax collector is, as this title of his office implies, the collection of taxes, and a failure to perform this is a plain breach of his official bond. "The failure to collect is a breach of the bond equally with a failure to pay over the money collected. The duty of collecting is as important as the duty of paying honestly. The one duty is precedent to the other": *State v. Lot*, 69 Ala. 147. The statutes in all jurisdictions make provision for such taxes as with due diligence cannot be collected, but if by reason of negligence or willful misfeasance a tax collector leaves taxes due and uncollected, his sureties become answerable for the resultant injury. In *People v. Smith*, 123 Cal. 70, 55 Pac. 675, it appeared that the county assessor was by law required to collect "the taxes on all personal property when in his opinion said taxes are not a lien upon real estate sufficient to secure the payment of the taxes." It was held that where personal taxes were assessed to persons who were not assessed upon lands and improvements, no question of the sufficiency of the lien of such taxes on real estate could arise. There was in such case no lien on real estate at all, no room for discretion as to its sufficiency was left, the neglect to collect such taxes was a failure to perform a ministerial duty, for which failure the sureties on the official bond were answerable.

2. **Seizure of Exempt Property.**—Analogous to the case of a levy by a sheriff on property exempt from levy (see III, a, 4, B), is that of a seizure by a tax collector for delinquent taxes of property by law exempt from such seizure. In line with the case referred to, this is held to be a breach of the official bond of the tax collector. Thus, in *Palmer v. Pettingil* (Idaho), 55 Pac. 653, property in the hands of a receiver, and therefore in the custody of the law, was seized and sold for taxes. The court held such property exempt from seizure, and the bondsmen of the tax collector liable for his illegal act in making such seizure and sale. So the exaction of illegal fees under color of office is deemed a breach of a tax collector's official bond: *Kane v. Union Pac. Ry. Co.*, 5 Neb. 105. See, however, *Clark v. United States*, 60 Ga. 156, in which the bond of a collector of internal revenue was held to be indemnity to the government only, and not to cover injuries done private persons through illegal seizures by his deputies.

3. Proceeds of Collection.

A. **General Rule.**—The most frequent delinquency for which it is sought to hold the sureties on an official bond of a tax collector is

his failure to pay over or his conversion of the taxes collected by him. Where the taxes were valid, and the warrant under which they were collected was regular, no doubt can exist but that the official bond is breached by his conversion of such funds. See, however, as instances, *Christian v. Ashley Co.*, 24 Ark. 142; *People v. Edwards*, 9 Cal. 286; *Carothers v. Presidio Co.*, 4 Tex. Civ. App. 529, 23 S. W. 491. Where the funds are lost without any neglect or other default on the part of the officer, there is, of course, a question whether he is liable, but this has already been discussed (II, f), and the general principles there treated have no peculiar application to funds held by a tax collector as distinguished from those held by other officers, and need not therefore be here again considered.

B. Immaterial that Tax was Irregularly Levied or Collected.—In *Foxcraft v. Nevins*, 4 Greenl. (Me.) 72, was held that the sureties on the official bond of a tax collector, conditioned for the collection and payment over of all taxes “for which he should have sufficient warrant,” were not liable for his conversion of taxes collected on a warrant insufficient because of the failure of the assessors to sign the tax bill. The decision is, however, dependent upon the restrictive words in the condition of the bond, and where no such restriction is found, the cases are singularly uniform in holding that a defective warrant, or even the fact that the taxes were collected without any warrant at all, furnishes no excuse for a conversion of taxes actually collected. The warrant, it is held, is necessary only to compel payment, and if taxes are voluntarily paid or on an irregular warrant, this does not make their receipt a personal act, or relieve the sureties of the collector’s official bond from responsibility for his proper application of the proceeds. “The defect excuses the collector from collecting, but does not excuse him from paying over what is paid to him. This still remains a duty devolved upon him by virtue of his office. It was optional for him to proceed in the collection of the taxes, and exhaust what authority was given him for that purpose, or decline to do so. But electing to proceed, . . . he must proceed as collector, and can do so in no other capacity. Whatever money he receives upon the taxes, he receives as collector”: *Brunswick v. Snow*, 73 Me. 17. To the same effect, see *Fuller v. Calkins*, 22 Iowa, 301; *Commonwealth v. Gabbert*, 5 Bush, 438; *Combs v. Breathitt Co.*, 20 Ky. Law Rep. 529, 46 S. W. 505; *Johnson v. Goodridge*, 15 Me. 29; *Frawnfelder v. State*, 66 Md. 80, 5 Atl. 410; *Lynn v. Cumberland*, 77 Md. 449, 23 Atl. 1001; *Cogswell v. Eames*, 14 Allen, 48; *State v. Harney*, 57 Miss. 863; *Village of Olean v. King*, 116 N. Y. 355, 22 N. E. 559; *McGuire v. Williams*, 123 N. C. 349, 31 S. E. 627; *Town of Pawlet v. Kelly*, 69 Vt. 398, 38 Atl. 92; *Meads v. United States*, 81 Fed. 684, 26 C. C. A. 229; *King v. United States*, 99 U. S. 229; *United States v. Chase*, Fed. Cas. No. 14,788.

C. Defense that Tax was Unconstitutional.—Where it is not merely the regularity of the levy, nor of the process under which it was collected, but the validity or constitutionality of the tax itself which is assailed, the cases are not in such complete harmony. According to one line of cases, the invalidity of the tax furnishes no defense to an action on the collector's bond for his failure to pay it over. As is said in *Waters v. State*, 1 Gill (Md.), 302: "The question of constitutional authority to levy the tax would properly arise between the collector and the person taxed before payment, or after payment between the state and such person." But as between the collector and the state, after the former has received the tax, he cannot, according to the view of these cases, litigate the legality of a tax which he has treated as a legal tax in collecting it, and thus convert into a private fund moneys paid to him as public taxes: *Waters v. State*, 1 Gill, 302; *McGuire v. Williams*, 123 N. C. 349, 31 S. E. 627; *City of Wheeling v. Black*, 25 W. Va. 266. On the same principle, if a county assessor acts under a statute making him collector of taxes, his sureties cannot escape liability on the ground that the statute giving him this authority is unconstitutional: *Meagher Co. Commrs. v. Gardner*, 18 Mont. 110, 44 Pac. 407. At any rate, the fact that funds were illegally received by a tax collector does not affect the liability of his sureties for a misappropriation of funds he was by law entitled to receive, and where the two funds are mingled, such sureties are liable for a pro rata of the amount taken: *Schuster v. Weissman*, 63 Mo. 552; and where a tax collector refuses to repay taxes held by him and paid under protest, where the claimant has been judicially declared not the owner of the land on which the taxes were assessed, he thereby breaches his bond, although had he paid the money to the county, as he was by law required to do, his sureties would have been relieved from liability thereby: *Lawrence v. Doolan*, 68 Cal. 309, 5 Pac. 484, 9 Pac. 159.

There is, however, as has been said, a conflict among the authorities in this connection, and, according to one view, opposed to that just considered, the sureties on the official bond of a tax collector are not to be held liable for a tax which he has no constitutional authority to receive. Whatever liability the tax collector incurs is, according to the doctrine of these cases, personal to himself, and cannot affect the sureties on his official bond: See, as taking this view, *Greenwell v. Commonwealth*, 78 Ky. 320; *Dawson v. Lee*, 83 Ky. 49; *Waley v. Commonwealth (Ky.)*, 61 S. W. 35; *State v. Merryman*, 7 Har. & J. (Md.) 79.

D. Miscellaneous.—In *United States v. Hermance*, 15 Blatchf. 6, Fed. Cas. No. 15,355, affirming Fed. Cas. No. 15,356, it appeared that a collector of internal revenue received from a distiller money intended as a tax on brandy, but converted the money to his own use without issuing any stamps to the distiller. The court held that

this did not amount to a payment of the tax, that the money never became public money, and for its conversion the official bondsmen were not responsible. The theory upon which the decision proceeds is that the payment of a tax on distilled spirits is in reality "a purchase of the stamps which is to make the payment available, and as a purchase would not be complete until the stamp had been put in a condition by the collector to be affixed to the cask, or at least until it had been reasonably designated and set apart for that purpose, it is not unreasonable to require the same things to be done before the payment is complete." The reasoning is not entirely convincing, and the result reached is of doubtful correctness.

In *Osenton v. Burnett*, 19 Ky. Law Rep. 610, 41 S. W. 270, it was held that the sureties of a bond executed by a tax collector for the collection of a tax levied by the county to pay a judgment in favor of a particular bondholder are not liable to other bondholders for the amount received by the tax collector in excess of the judgment, the bond being regarded as intended to cover the collection and payment of sufficient only to satisfy that judgment. Any liability incurred for the excess was personal to the officer, and did not affect his sureties. The official bond of a collector of internal revenue covers the misappropriation of money received by him to pay the expenses of his office: *Broome v. United States*, 15 How. 143; or for the pay of storekeepers: *United States v. McCartney*, 1 Fed. 104; as well as money received in the collection of revenue.

4. **As Ex-officio Treasurer.**—Where a tax collector is ex-officio county treasurer, giving separate bonds for his acts in each capacity, he is deemed to hold the taxes collected as tax collector, until he has reported their collection to the proper officer or board: *Walker v. People*, 95 Ill. App. 637. After he has settled his accounts as tax collector with the auditor, or whoever is the officer named by law, his liability as tax collector ceases, and he is thereafter responsible for the safety of the funds on his bond as treasurer: *Butte Co. v. Morgan*, 76 Cal. 1, 18 Pac. 115; *Norridgewock v. Hale*, 80 Me. 362, 14 Atl. 943.

c. Treasurer.

1. **Failure to Render True Reports.**—Where a custodian of public funds is required by the law to make reports of the money in his hand at certain times, or of other matters connected with his office, the failure to render such reports is in itself a breach of his official bond: *Monticello v. Lowell*, 70 Me. 437; unless he was rendered unable to make them by the neglect of other officers in supplying the necessary data: *Houghton Co. Supervisors v. Rees*, 34 Mich. 481. The failure to report cannot, however, be said to be the proximate cause of a subsequent embezzlement by the delinquent officer, merely because this latter would probably have been prevented by the

discovery in the report of previous defaults: *State v. Hall*, 68 *Misa* 719, 10 *South* 54. Where the statute requires a report, the return of a false report ordinarily renders the bondsmen of the treasurer liable: *Board of Supervisors v. Bristol*, 99 *N. Y.* 316, 1 *N. E.* 878; but the mere false statement of a fact in the report, which fact need not by law be stated at all, as, for instance, a statement of the amount of cash on hand, where the statute requires only a statement of receipts and disbursements, does not constitute a breach of the treasurer's official bond: *Coe v. Nash*, 91 *Tex.* 113, 41 *S. W.* 473, reversing (*Tex. Civ. App.*), 40 *S. W.* 235. In Wisconsin, it seems that in order to recover on the bond of a treasurer for a false report, it must appear that the mistake was willful, and remains unrectified after he has been requested and given opportunity to rectify: *Iowa Co. Supervisors v. Vivian*, 31 *Wis.* 217.

2. **Refusal to Pay Legal Warrants.**—It is the duty of a treasurer to pay out the money in his custody on the presentment of proper warrants, quite as much as to keep it safely, while in his custody. If, therefore, having sufficient funds in his custody, he refuses to pay a warrant legally drawn and presented, and to which such funds are subject, he thereby breaches the condition of his official bond: *Briggs v. Coleman*, 51 *Ala.* 561; *Barnes v. Hudman*, 57 *Ala.* 504; *Somerville v. Wood*, 129 *Ala.* 369, 30 *South* 280; *People v. Oeltzen*, 56 *Ill. App.* 138; *Monticello v. Lowell*, 70 *Me.* 437; *Spurlock v. State*, 52 *Fed.* 382, 3 *C. C. A.* 151. In order that such refusal may amount to a breach, however, it must appear that the warrants thus dishonored were entirely regular, and that the formalities required by law to enable money to be drawn from the treasury were complied with: *City of East St. Louis v. Launtz*, 20 *Ill. App.* 644; *Annapolis Sav. Inst. v. Bannon*, 68 *Md.* 458, 13 *Atl.* 353.

3. **Payment of Illegal Warrants.**—If a warrant drawn upon a treasurer bears upon its face the evidence of irregularity, its payment by that officer is a misappropriation of the funds in his charge, and a breach of his official bond: *Jackson Co. v. Derrick*, 117 *Ala.* 848, 23 *South* 193; *Los Angeles v. Lankersheim*, 100 *Cal.* 525, 35 *Pac.* 153, 556; *Paxton v. State*, 59 *Neb.* 460, 80 *Am. St. Rep.* 689, 81 *N. W.* 383. Where, however, a treasurer has no check upon claims allowed, on a school fund, for instance, payment by him of a genuine order or warrant of the auditor, although for a claim which was not properly allowed by the board of education is not a breach of his bond, since he was not chargeable with notice of the infirmity of the claim: *Los Angeles v. Lankersheim*, 100 *Cal.* 525, 35 *Pac.* 153, 556. In *Priet v. De La Montanya* (*Cal.*), 22 *Pac.* 171, it was held that an action on the bond of a treasurer could not be maintained by a person who held a warrant on the treasury, where, though an illegal warrant for the same claim had been paid by the treasurer, it appeared that during the term of the latter enough funds had

always remained to pay the plaintiff's warrant. This was reversed in *Priet v. De La Montanya*, 85 Cal. 148, 24 Pac. 612, and it was there held that the payment of the illegal warrant from a fund set apart by the treasurer for the payment of plaintiff's claim was itself a misappropriation, and unaffected by the fact that the whole fund was not exhausted until the treasurer's term had expired. Where the bond of the treasurer runs to a board, such as a city council or board of school commissioners, and is conditioned that he shall make payments "as directed by the board," if he makes such payments as they direct, the condition is satisfied, and it is not a good statement of a breach of his official bond to allege that payments were made without authority of law: *City of East St. Louis v. Flannigen*, 69 Ill. App. 167; *State v. Hill*, 88 Md. 111, 41 Atl. 61. The retention of illegal fees is, of course, a breach of a treasurer's official bond: *Howe v. State*, 53 Miss. 57; *Stoner v. Keith Co.*, 48 Neb. 279, 67 N. W. 311.

4. **Improper Issuance of Tax Receipts, Warrants, etc.**—An action on the bond of a county treasurer for the issuance by him of receipts in full for taxes, without collecting interest thereon, and as a result of which the lien of the county for such interest on the property of the taxpayer was lost, is, it is held in *People v. Myers* (Colo. App.), 65 Pac. 409, not maintainable, since the loss of a tax lien is not the necessary result of the issuance of the tax receipt, and the averment that it was the result is no more than a statement of a conclusion of law by the pleader. Where a county treasurer is forbidden by law to deal with county warrants, one who purchases a warrant from him which he should have canceled, but which he instead reissued, is *particeps criminis*, and neither he nor subsequent purchasers can recover on the official bond of the treasurer: *McConnell v. Simpson*, 36 Fed. 750.

5. Misappropriation of Public Funds.

A. **In General.**—The primary duty of a custodian of public funds is, of course, to deal honestly with the public in reference to them, and that his misappropriation of such funds constitutes a breach of his official bond is a proposition too nearly axiomatic to require the citation of authorities in its support. The duty and the correlative liability on the official bond for the breach of that duty extend to all funds received by him by virtue of his office, and for which he has not given a separate bond. Thus, the official bond of a county treasurer covers the funds in his hands, whether those funds belong to the county, or to a school district, a township or the state, subject, of course, to principles already discussed (II, c), which control where separate bonds have been given for particular funds: See *Perry v. Woodberry*, 26 Fla. 84, 7 South. 483; *Jackson Co. v. Craft*, 6 Kan. 145; *Marquette Co. v. Ward*, 50 Mich. 174, 15 N. W. 70. So the general official bond of a treasurer covers money in his hands

belonging to a railroad, which had been raised by taxation, and voted to the railroad: *Cedar Rapids etc. Ry. Co. v. Cowan*, 77 Iowa, 535, 42 N. W. 436; or a fund bequeathed to the poor of a certain county: *Prickett v. People*, 88 Ill. 115. Such funds, although held in trust for particular purposes, are funds received by virtue of his office, and for a misapplication of them the sureties on the bond of the treasurer are responsible. In *United States v. Rogers*, 81 Fed. 941, 27 C. C. A. 14, on the other hand, it was held that the sureties on the bond of a receiver of public moneys in a land office, conditioned on his faithful accounting "for public moneys," was not breached by his failure to account for moneys received from the sale of Indian lands, since such money belonged to the Indians, and not to the United States. Had the receiver been entitled to receive these moneys, the reason given for the decision might be said to be doubtful. It appears, however, that it was never any part of the duties of that officer to sell the land or receive the payments therefor, and the case may well be sustained on the grounds that his receipt of such money was extraofficial, and, therefore, not within the purview of the bond.

B. Funds Unauthorizedly Received.—The bond of a treasurer does not, any more than that of any other officer, cover his defaults in respect to funds not held by him in his official capacity. His sureties do not guarantee his faithfulness and honesty, except in the performance of his official duties as treasurer, nor for money held in an extraofficial or private capacity. Accordingly, if he is authorized by a board to borrow a certain amount, and, by employing false representations, borrows in excess of the amount named, the sureties on his official bond are not responsible for his misappropriation of the excess: *Rensselaer County v. Bates*, 17 N. Y. 242. So it is held that the bond of a treasurer does not cover his duty to repay funds which, though formerly in his custody, have been loaned to him personally by the proper authorities, even though all the formalities prescribed by law for the making of such a loan have not been complied with. His duty to repay is not an official duty: *Wilkes-Barre v. Rockafellow*, 171 Pa. St. 177, 50 Am. St. Rep. 795, 33 Atl. 269.

C. Funds Improperly Raised or Collected.—Where, however, money is received by a treasurer as public funds, and in his capacity as treasurer, he or his sureties cannot, by the weight of authority, attack the validity of the means by which it was raised, in order to turn his official trust into a private one, or make his appropriation of such money an extraofficial delinquency, and, therefore, not a breach of his official bond. Thus, where money is borrowed or raised by taxation, and paid into the treasury, it is no defense that the board which raised the money, in so doing, exceeded its lawful authority. As is said in *Cheboygan Co. v. Erratt*, 110 Mich. 156,

67 N. W. 1117: "We think it altogether clear that, when it is shown that moneys have actually come into the hands of the treasurer as treasurer, neither he nor his bondsmen can avoid liability by showing either that irregularities exist in the proceedings by which such moneys were collected, or that there was no authority to enter into the agreement which resulted in the receipt of the money by the county. It is enough to impose upon the treasurer an active duty that the county has received the money, and the obligation on the bond exists when the money finds its way into his hands as treasurer": See, to the same effect, *Hague v. State* (Ind. App.), 63 N. E. 799; *Wilson v. Town of Monticello*, 85 Ind. 10; *Renessaelaer Co. v. Bates*, 17 N. Y. 242; *Wylie v. Gallagher*, 46 Pa. St. 205; *Boehmer v. County of Schuylkill*, 46 Pa. St. 452; *Simons v. Jackson Co.*, 63 Tex. 428. So it is no defense for failure to pay over or account for money paid into the treasury as taxes, that they were collected without warrant: *Berrien Co. v. Bunbury*, 45 Mich. 79, 7 N. W. 704; or that the levy was irregular: *Mahaska Co. v. Ingalls*, 14 Iowa, 170.

On the same principle, it is held immaterial whether or not a treasurer is by statute authorized to receive partial payments of taxes due, where he does, in fact, receive them, and misappropriates them. Such was the state of facts in *Warren Co. v. Ward*, 21 Iowa, 84, and in answer to the objection that the treasurer was not in law bound to receive partial payments of taxes, and in so receiving them acted personally rather than officially, it is said by the court: "The officer was, perhaps, not bound to take the money in this way; but if he did, accepting it as treasurer, he held it for the county, or the respective funds, as fully as though the last cent had been paid. It is not as though it had been left with him on deposit until the whole could be paid. The taxpayers paid it to be applied on their taxes, and it was so received. . . . It is true he could not be required to give receipts for such partial payments, but if the money can be traced into his hands, we entertain no doubt as to his official liability." To the same effect, *Custer Co. v. Tunley*, 13 S. Dak. 7, 79 Am. St. Rep. 870, 82 N. W. 84. Nor does the lack of authority of a treasurer to negotiate bonds for a city or county affect his liability on his bond as treasurer, where, although the bonds were negotiated by him, their proceeds were received in his capacity as treasurer: *Smith v. Peoria Co. Supervisors*, 59 Ill. 412; *State v. Hauser*, 63 Ind. 155. Compare *Stevenson v. Bay City*, 26 Mich. 41, A receiver of public moneys in a land office is, it is held, liable on his official bond for money received from pre-emptors of public lands, regardless of any irregularity in the proceedings leading up to the passage of title: *Smith v. United States* (Ariz.), 45 Pac. 341; *Meads v. United States*, 81 Fed. 684, 26 C. C. A. 229; *Potter v. United States*, 107 U. S. 126, 1 Sup. Ct. Rep. 524.

In the cases above considered, and by the authorities generally, no distinction is made between a treasurer and his sureties, so far as con-

cerns the right of either to question the legality of the means by which money paid to and received by him as treasurer was raised. Some few of the cases seek, however, to make such a distinction, and while denying to the treasurer himself the right to question that he holds the funds officially, permit his sureties to show that the money paid into the treasury was borrowed or raised without authority. Such is the holding in *Mason v. Commissioners of Roads, etc.*, 104 Ga. 35, 30 S. E. 513, in which the general rule is conceded as to the liability of the officer himself. Following *Frost v. Mixsell*, 38 N. J. Eq. 586, however, the court holds that a different rule obtains as to the sureties, and says: "It is true that in the cases of *Wylie v. Gallagher*, 46 Pa. St. 205, and *Boehmer v. County of Schuylkill*, 46 Pa. St. 452, a contrary view was taken by the court; but we think the better reason under the condition of the bond here involved supports the position that the sureties are not liable for the failure of the treasurer to account for the money unlawfully borrowed. The law fixed the boundaries of the treasurer's official conduct. The reception and disbursements of money other than that which legitimately belonged to the county was not an official duty, but was a transaction outside of the functions of the office. There was no duty imposed upon the treasurer to receive or disburse a cent of the money unlawfully borrowed: and it therefore seems clear that while the sureties are responsible for the failure of the treasurer to pay over all lawful money belonging to the county, they are not responsible for the unlawfully borrowed money." The case, together with the one it follows, *Frost v. Mixsell*, 38 N. J. Eq. 586, is undoubtedly contra to the weight of authority, and with the general rule (II, a, 3) that so far as their liability on the bond is concerned an officer and his sureties are bound to the same extent.

D. Funds not Actually Received.—The bond of a treasurer covers only such funds as he has received, and not such as he did not receive, but which were collected by other officers and should have been paid into the treasury: *Prairie School Tp. v. Haselem*, 3 N. Dak. 328, 55 N. W. 938. This principle was in *Prickett v. People*, 88 Ill. 115, applied where by a private arrangement between the tax collector and treasurer of a county, the former refunded a certain amount to the taxpayers out of revenue collected by him. This money never having reached the treasury, the treasurer's act with respect to it could not, it was held, bind his sureties. It is not necessary that a treasurer receive coin in order to render his sureties liable. He is chargeable as with cash for choses in action received by him: *Montmorency Co. v. Wiltse*, 125 Mich. 47, 83 N. W. 1010; *Board of Education v. Robinson*, 81 Minn. 305, 83 Am. St. Rep. 374, 84 N. W. 105; *Bush v. Johnson*, 48 Neb. 1, 58 Am. St. Rep. 673, 66 N. W. 1023; but it must appear that he received such choses in action as money in order to charge him or his sureties as for money received. An allegation that a tax collector "had

and sought to pay to the treasurer" certain sums of money, and in furtherance of that purpose had delivered to him certain worthless checks on an insolvent bank, without alleging that the treasurer gave any receipt as required by law where money is paid to him, does not show that he received such checks as money, but is consistent with a refusal by him to do so: *Bingham Co. v. Woodin* (Idaho), 55 Pac. 662.

6. Duties Imposed Subsequently to Execution of Official Bond. In order that subsequently imposed duties may be covered by the official bond of a treasurer, they must, as we have seen (II, b), be germane to the usual and existing duties of the office. It is accordingly held that the bond of a state treasurer does not cover duties subsequently imposed upon him as cashier of the state bank: *Reynolds v. Hall*, 2 Ill. (1 Scam.) 35; nor does that of a treasurer of a branch United States mint cover duties as a stamp agent imposed subsequent to its execution: *United States v. Cheeseman*, 3 Saw. 424, Fed. Cas. No. 14,790. In *State v. Thomas*, 88 Tenn. 491, 12 S. W. 1034, it is held that the bond given by one as state treasurer was not intended to, and did not, cover his acts or defaults as ex-officio insurance commissioner.

7. Funds Covered by Special Bond.—Where a treasurer is made custodian of several distinct funds, as where a city or county treasurer is made school treasurer, the liability of the sureties on his general official bond for such other funds depends upon principles already discussed (II, b, c). The duty of caring for a school fund is germane to those ordinarily required of a treasurer, and if subsequently imposed without a new bond being provided for to cover them, will be covered by the treasurer's general official bond: *Board of Education v. Quick*, 99 N. Y. 138, 1 N. E. 533. See, also, *Mahaska Co. v. Ingalls*, 14 Iowa, 170. So where the duties of school treasurer were imposed upon a city or county treasurer prior to the execution of his bond, if no separate bond for his duties in the former capacity was required, they are covered by his general bond: *Perry v. Woodberry*, 26 Fla. 84, 7 South. 483; but where such separate bond is directed by law to be taken, the sureties on the general bond of the treasurer are not responsible for his delinquencies with respect to the school funds: *State v. Young*, 23 Minn. 551; *Redwood Co. Commrs. v. Tower*, 28 Minn. 45, 8 N. W. 907; *Board of Co. Commrs. v. Ring*, 29 Minn. 398, 13 N. W. 181; *State v. Mayes*, 54 Miss. 417; *State v. Hall* (Miss.), 8 South. 464; *State v. Johnson*, 55 Mo. 80. Compare *Hall v. State*, 69 Miss. 529, 13 South. 38; *State v. Bateman*, 102 N. C. 52, 11 Am. St. Rep. 708, 8 S. E. 882; *Wake Co. Commrs. v. Magnin*, 86 N. C. 285.

8. Deposit of Funds in Bank.—Whether a treasurer is liable for money in his custody and lost without his fault by theft, accident

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or the failure of a bank in which he had deposited the funds, has been already considered (*supra*, II, f). The right of such an officer to deposit the public moneys in his custody in a bank on general deposit depends, to a great extent, upon the statutes of the various states, and will not be here discussed. See, however, in this general connection, and with reference to the liabilities of his sureties for such a deposit, *Bingham Co. v. Woodin* (Idaho), 55 Pac. 662; *People v. Oeltzen*, 56 Ill. App. 138; *Hiatt v. State*, 110 Ind. 472, 11 N. E. 359; *Lowry v. Polk Co.*, 51 Iowa, 50, 33 Am. Rep. 114, 49 N. W. 1049; *Ward v. School District*, 10 Neb. 293, 35 Am. Rep. 477, 4 N. W. 1001; *Thomssen v. Hall Co.* (Neb.), 89 N. W. 389.

d. Clerical Officers—Clerks of Court, City Clerks, County Clerks, etc.

1. Clerks of Court.

A. Issuance of Writs, etc.—Of that class of public officials whose duties are clerical in their nature, and which includes clerks of court, registers in chancery, prothonotaries, city clerks, county clerks, registers of deeds, etc., one of the most important functions, particularly in the case of clerks of court, is the issuance of writs and citations. The failure of a clerk of court to issue a writ when demanded in the proper case is accordingly held to constitute a breach of his official bond: *Steele v. Thompson*, 62 Ala. 323; and if by his neglect to issue a citation when demanded the cause of action is lost by prescription, the sureties on his official bond are responsible. That the defendant in the action has not yet pleaded the prescription in bar is no defense to the action on the official bond, it being presumed that he will: *Anderson v. Johett*, 14 La. Ann. 624. Where the clerk is not permitted to issue execution without order of court, a failure to issue such a writ on his own motion cannot, of course, amount to a breach of his bond: *Badham v. Jones*, 64 N. C. 655.

In *State v. Sherwood*, 42 Mo. 179, it was held that one who claimed to have been elected tax collector could not sue the sureties of the county clerk for their principal's failure to cast up the votes and issue the certificate of election to him, or for his maliciously issuing it to another candidate. The theory of the case is, however, not that if the plaintiff had shown himself entitled to the office recovery could not be had on the clerk's bond, but that such an action is not the proper way of trying the right or title to an office: See *Hunter v. Chandler*, 45 Mo. 457.

B. Issuance of Letters of Guardianship.—Under an Indiana statute providing for the appointment of guardians of minors by the probate court in term time or by the clerk in vacation, it was held that where a clerk in term time issued letters of guardianship to one never appointed guardian by the court, and under such letters their holder secured possession of and squandered the minor's estate, the sureties of the clerk were liable on the bond: *State v.*

Christian, 13 Ind. App. 308, 41 N. E. 603. Where, however, the letters of guardianship confer no power on the guardian until a bond is given, the issuance by a clerk of such letters before the guardian gave bond did not, it was held in *Carpenter v. Sloane*, 20 Ohio, 327, constitute a breach of the clerk's bond, the view being that it was legally impossible for the guardian to secure possession of the property by virtue of any letters of guardianship issued to him, since they had no legal force until the bond was given. On the same principle it was held in *Governor v. Wiley*, 14 Ala. 172, that while the issuance by a register of chancery of an injunction to restrain the collection of a *fiery facias*, although done without authority, was a breach of his bond, if, on the other hand, the injunction failed to show on its face the authority under which it was issued, it was nugatory, obedience to it could not be coerced, and it cannot be said to have legally prevented the collection of the *fiery facias*.

C. **Issuance of Marriage Licenses.**—The officers of the class under consideration are usually invested with the power to issue marriage licenses, and a penalty is frequently prescribed for the improper issuance of such licenses. The liability of the sureties on official bonds for penalties imposed on their principals has already been discussed (see *supra*, II, i; and in this particular connection, *State v. Baker*, 47 Miss. 88; *Holt v. McLean*, 75 N. C. 347; *Jayner v. Roberts*, 112 N. C. 111, 16 S. E. 917). The issuance of a marriage license to parties not entitled thereto, because under age, does not, however, give a cause of action for damages on the bond, as in legal contemplation no one is thereby injured: *Brooks v. Governor*, 17 Ala. 806.

D. **Ministerial Duties, Generally.**—In the performance of the various clerical duties imposed upon a clerk of court and other officers of the same class, such officers are bound to use diligence and care, and for neglect to perform or for a negligent and improper performance of them, the sureties on their official bonds are answerable, in the event that injury results therefrom. Thus, the sureties of a clerk of court have been held responsible for his neglect to certify and send up a record within the time required, as a result of which a writ of error was dismissed: *Collins v. McDaniel*, 66 Ga. 203; for an erroneous satisfaction of a judgment on the docket, although made by mere mistake: *Van Etten v. Commonwealth*, 102 Pa. St. 596; for his failure to enroll or docket a judgment: *Ryan v. State Bank*, 10 Neb. 524, 7 N. W. 276; *Young v. Connelly*, 112 N. C. 646, 17 S. E. 424; *Strain v. Babb*, 30 S. C. 342, 14 Am. St. Rep. 905, 9 S. E. 271; *Chester Co. v. Hemphill*, 29 S. C. 584, 8 S. E. 125 (compare *Foote v. Vanzandt*, 34 Miss. 40, holding sureties not liable for a statutory penalty; see *supra*, III, i); for failure to enter: *Governor of State v. Dodd*, 81 Ill. 162;

or for an erroneous entry of the amount of a judgment: *Saylor v. Commonwealth* (Pa.) 5 Atl. 227; for a failure to place an action at issue on the issue docket: *Brown v. Lester*, 21 Miss. (13 Smedes & M.) 392; and for a failure to make a transcript when demanded: *Bates v. Foree*, 4 Bush, 430; *Commonwealth v. Chambers*, 31 Ky. (1 Dana) 11. So where it is the duty of a prothonotary to search the records and give certificates of judgments, the issuance of an erroneous certificate is a breach of official duty, and ordinarily of his official bond: *Zeigler v. Commonwealth*, 12 Pa. St. 227. In *Commonwealth v. Harmer*, 6 Phila. 90, however, it is held that such an act is not covered by the bond of a recorder of deeds conditioned "to deliver up the records, etc., . . . to his successor," and plainly intended to cover only such injuries as affect the public and not private injuries, such as those caused by a defective certificate of search. Failure by such an officer to properly index the records of his office constitutes a breach of his official bond: *Norton v. Kump*, 121 Ala. 446, 25 South. 841; *State v. Grizzard*, 117 N. C. 105, 22 S. E. 93; *Johnson v. Brice*, 102 Wis. 575, 78 N. W. 1086; but a statute requiring a clerk of court to enter the names of the justices present at the appointment of a guardian on the docket and on the guardian's bond furnishes merely a cumulative means of proving this fact, and for failure to perform this duty a clerk is not liable on his bond: *Fornell v. Koonce*, 51 N. C. 379. The issuance of a false certificate of acknowledgment is a breach of the bond of a clerk of court: *People v. Bartels*, 138 Ill. 322, 27 N. E. 1091, reversing 38 Ill. App. 428; *Bartels v. People*, 152 Ill. 557, 38 N. E. 898.

E. Approval of Bonds.—Where a clerk of court is by statute required to approve such bonds as are given in the course of judicial proceedings, or by officers, such as executors, guardians, etc., he is bound to use due diligence in the performance of this duty. If, therefore, he neglects to take any bond at all (*McNutt v. Livingston*, 15 Miss. (7 Smedes & M.) 641), or to take such evidence of the sufficiency of the sureties as is required by the statute (*Heater v. Pearce*, 59 Neb. 583, 81 N. W. 615), or where the statute prescribes no particular mode of determining their sufficiency, if he fails to use such diligence as an ordinarily prudent person would exercise in like transactions, his official bond is liable for such injury as may result. The fact that in determining the sufficiency of sureties the officer acts quasi judicially, or that in the particular case he approved the bond in good faith, cannot affect his liability or that of his sureties where he has been negligent in the performance of his duty: *Spain v. Clements*, 63 Ga. 786; *Marshall Field & Co. v. Wallace*, 89 Iowa, 597, 57 N. W. 303; *McNutt v. Livingston*, 15 Miss. (7 Smedes & M.) 641; *Heater v. Pearce*, 59 Neb. 583, 81 N. W. 615; *Topping v. Windley*, 99 N. C. 4, 5 S. E. 14. Where the bond taken

is given to dissolve a garnishment and proves valueless, the measure of damages is the amount which would have been realized from the garnishee had the garnishment not been dissolved: *Spain v. Clements*, 63 Ga. 786. In Nebraska, it is held that even where no actual damage has resulted from the insufficiency of the bond, nominal damages are recoverable: *Heater v. Pearce*, 59 Neb. 583, 81 N. W. 615. In North Carolina it was held in an early case that where a clerk of court is by statute required "to issue ex officio" a notice to guardians at stated periods to renew their bonds, the sureties on the clerk's bond were liable for his failure to issue such notice, where the guardian became insolvent, and a debt due from him was thereby lost: *State v. Watson*, 29 N. C. 289. This was, however, held otherwise in *State v. Briggs*, 46 N. C. 364, on the grounds that the damages were too remote, and that the statute imposing the duty to issue notices on the clerk did not intend to make him liable on his official bond for failure to perform this duty. The doctrine of the later case has since been declared preferable: *State v. Lowe*, 64 N. C. 500.

Where the approval of a bond given by a guardian or in judicial proceeds is a duty imposed upon the court, the sureties of the clerk are very clearly not answerable for the sufficiency of such bond: *Rend v. McCully*, 65 Iowa, 629, 22 N. W. 902; *Dewey v. Kavanaugh*, 45 Neb. 233, 63 N. W. 396; *McAlister v. Scrice*, 15 Tenn. (7 Yerg.) 277, 27 Am. Dec. 504; and on the same principle it is held that where the statute requires the clerk to approve the security of an appeal bond, he is not thereby made responsible on his official bond for the defects of the appeal bond in other particulars, as in the naming of the obligees: *People v. Leaton*, 121 Ill. 666, 13 N. E. 241; affirming, 25 Ill. App. 45. For the liability of sureties on defective bonds or undertakings on appeal, see monographic note to *Babcock v. Carter*, 67 Am. St. Rep. 197-204.

F. Collection, etc., of Fees.—Where the duty of collecting court fees is imposed upon a clerk of court, though subsequently to the execution of his official bond, it is sufficiently germane to his ordinary duties to be covered by that undertaking, particularly where he was formerly authorized to receive them, and his sureties may be held answerable for his failure to collect such fees: *Governor of State v. Ridgway*, 12 Ill. 14. Compare, however, *People v. Treadway*, 17 Mich. 480. So where the statute requires a report of and accounting for all fees received by a clerk, a failure to make such report is a breach of his official bond, although where there was no balance to turn over, the damages recoverable are nominal only: *United States v. Ambrose*, 2 Fed. 552. Where, however, fees were actually collected and should have been paid over, a failure to do so renders the official bondsmen of the officer answerable for their amount: *Cooper v. People*, 28 Colo. 87, 63 Pac. 314; *Shuling v. State*

(Ind.), 62 N. E. 49; *Scott v. Hunt*, 92 Tex. 389, 49 S. W. 210. See, also, *Watson v. Smith*, 26 Pa. St. 395. In Missouri it is held that where the report of a clerk as to the fees received by him is correct, an order of court that he pay them into the treasury is necessary to fix the breach: *State v. Dent*, 121 Mo. 162, 25 S. W. 924. Where, however, the report itself is false, no such order of court is requisite: *State v. Henderson*, 142 Mo. 598, 44 S. W. 737; *State v. Chick*, 146 Mo. 645, 48 S. W. 829; *State v. Gideon*, 158 Mo. 327, 59 S. W. 99.

The collection of fees from the treasury by a clerk of court under a statute afterward held unconstitutional is a breach of his official bond: *Commonwealth v. Carter*, 21 Ky. Law Rep. 1509, 55 S. W. 701. On the other hand, in an action on his bond, he cannot defend his failure to pay into the treasury fees received by him on the ground that they exceeded in amount those authorized by law: *Hewlett v. Nutt*, 79 N. C. 263. Where, however, it is no part of a clerk's duty to collect the fees of other officers in receiving them, he does not act officially, but as agent of the party paying them, and his failure to pay them to the proper officer is not a breach of his official bond: *State v. Givan*, 45 Ind. 267; *Matthews v. Montgomery*, 25 Miss. (3 Cush.) 150. Compare *State v. White*, 152 Mo. 416, 53 S. W. 1064. This is, of course, otherwise where under the law he is authorized to collect the fees of other officers and refuses to account for such fees: *People v. Barnwell*, 41 Ill. App. 617; *Weisenborn v. People*, 53 Ill. App. 32, 58 Ill. App. 114.

G. Misappropriation of Funds Received by.—The general principle determining the liability of the official bondsmen of a clerk of court for his defaults with respect to money held by him is undoubted. As in the case of other officers, the sureties are responsible only for such funds as were held by him in his official capacity, and while there is considerable apparent conflict as to the funds which are to be deemed held officially as clerk, this is due not so much to any diversity in the application of the general principle, as to the varying authority with which clerks of courts are invested in the various jurisdictions with respect to the receipt of money.

Where, for instance, a clerk of court has no authority to receive money in payment of a judgment, his conversion of such money, if paid to him, is a breach of a private trust, but not of his official bond: *Lewis v. Johnson*, 1 Walk. 260. In those jurisdictions, on the other hand, in which he is by the prevailing practise or by statute the proper party to receive payment of a judgment, his official bond covers the faithful application of money received for that purpose: *Morgan v. Long*, 29 Iowa, 434; *McDonald v. Atkins*, 13 Neb. 568, 14 N. W. 532; *Appeal of Deckert*, 5 Watts & S. 342. See, also, *State v. McGill*, 15 Ind. App. 289, 40 N. E. 1016, 43 N. E. 1016. So

in Indiana it was held that money received by a clerk which was paid into court as tender, without any order of court, was received by him without authority, and not being held by him in an official capacity could not render his sureties liable: *Carey v. State*, 34 Ind. 105. Where, however, a clerk is authorized to receive such payments, he is liable on his official bond therefor: *Billings v. Teeling*, 40 Iowa, 607; *Howard v. United States*, 102 Fed. 77, 42 C. C. A. 169; *United States v. Howard*, 93 Fed. 719; affirmed, 184 U. S. 676, 22 Sup. Ct. Rep. 543.

A clerk of court has, in the absence of statute authorizing it, no authority as clerk to receive money belonging to an estate which is in the course of administration, and if he receives such money from a guardian or administrator (even, it is held in Indiana, where its payment to him is ordered by the court), his sureties are not responsible for his delinquencies in respect to it: *Jenkins v. Lemonds*, 29 Ind. 294; *Scott v. State*, 46 Ind. 203; *Bowers v. Fleming*, 67 Ind. 541. But where such payment is authorized by statute, or the official bond of the clerk is made to cover all money which may come into his hands "by virtue or color of his office," money received from an administrator or guardian and paid to him in his capacity as clerk is covered by his official bond: *Henry v. State*, 98 Ind. 381; *Latham v. Fagan*, 51 N. C. 62; *Thomas v. Connelly*, 104 N. C. 342, 10 S. E. 520; *State v. Boone*, 108 N. C. 78, 12 S. E. 897. So where money received as the proceeds of a judicial sale, whether made by special commissioners or by the clerk himself in the capacity of a commissioner, is by the court ordered paid into court, the clerk of court holds it thereafter in his official capacity as clerk, and his bondsmen are responsible for his conduct in respect to it: *Waters-Cates v. Wilkinson*, 92 Iowa, 129, 60 N. W. 514; *Dirks v. Juel*, 59 Neb. 353, 80 N. W. 1045; *Judges v. Deans*, 9 N. C. 93; *Alexander v. Johnston*, 70 N. C. 295; *Havens v. Lathene*, 75 N. C. 505; *Sharpe v. Connelly*, 105 N. C. 87, 11 S. E. 177; *Fort v. Assman*, 38 S. C. 253, 16 S. E. 887; *Waters v. Carrol*, 9 Yerg. 102. Conversely, where money held by him as clerk is directed by the court to be invested by him as receiver or trustee, until such investment is made he continues to hold as clerk, and his official bond as such covers such money: *Coleman v. Ormond*, 60 Ala. 328; *McPhillips v. McGrath*, 117 Ala. 549, 23 South. 721. See, also, *State v. Watson*, 38 Ark. 96. Money paid as a deposit in condemnation proceedings to a clerk in vacation (*State v. Enslow*, 41 W. Va. 744, 24 S. E. 679), or without an order of court where this is necessary (*People v. Cobb*, 10 Colo. App. 478, 51 Pac. 523), is not, it is held, received by the clerk officially, nor are his sureties responsible for its disposition. Where, however, such money has been received under order of court, or in pursuance of statute, it is covered by the official bond of the clerk: *Wilson v. People*, 19 Colo. 190, 41

Am. St. Rep. 243, 34 Pac. 944; Northern Pac. Ry. Co. v. Owens, 86 Minn. 18, ante, p. 336, 90 N. W. 371.

From the various illustrations above given, it is evident that the liability of the sureties of a clerk of court for moneys paid him is dependent wholly upon his right to receive them. If no authority exists for their payment to or receipt by him, his sureties are in no way answerable for his disposition of such funds. If, on the other hand, they are paid to him as clerk of court, where their receipt is authorized by a competent order of court or by statute, they are covered by his official bond. In addition to the cases already cited, see, as instances in which the money was deemed to have been received in his official capacity as clerk, and his bondsmen were held answerable therefor: *Jewett v. State*, 94 Ind. 549; *Sullivan v. State*, 121 Ind. 342, 23 N. E. 150; *Mahaaska Co. v. Searle*, 44 Iowa, 492; *Cooper v. Williams*, 75 N. C. 94; *Allen v. Perkins* (Tenn. Ch. App.), 45 S. W. 445. Compare, however, *Hardin v. Carrio*, 60 Ky. (3 Met.) 289, distinguished in *State v. Watson*, 38 Ark. 96. A bond of a clerk of court does not cover tavern licenses or school funds received by him, where it was not part of the duty of a clerk to collect such licenses or take charge of such funds: *State v. Norwood*, 12 Md. 177; *State v. Moeller*, 48 Mo. 331. The sureties of such clerk cannot, however, defend against liability for the proceeds of a sale of land officially received by their principal on the ground that the sale was invalid, because one who was made a defendant by publication was dead, where his heirs are ratifying the sale by seeking to recover the fund: *Ferrell v. Grigsby* (Tenn.), 51 S. W. 114.

2. City Clerks, County Clerks, etc.

A. Misappropriation of Funds.—The principles thus applied to money or funds received by clerks of court have the same application to other officers of the same class, such as city or county clerks. The sureties on the bonds of these officials are liable for their disposition of all moneys (as license fees, etc.) coming into their hands, which by virtue of their office they are entitled to receive: *Orton v. City of Lincoln*, 156 Ill. 499, 41 N. E. 159, reversing 56 Ill. App. 79; *Linch v. City of Litchfield*, 16 Ill. App. 612; *Campbell v. People*, 154 Ill. 595, 39 N. E. 578, affirming 52 Ill. App. 338. Under a bond conditioned to pay over all money received "according to law and the ordinances of the city," the sureties of a city clerk cannot defend on the ground that the moneys converted by him were received under an ordinance void because by the law all such money should be paid to the city treasurer: *Middleton v. State*, 120 Ind. 166, 23 N. E. 123. Compare *Meagher Co. v. Gardner*, 18 Mont. 110, 44 Pac. 407. The sureties of a county clerk are not responsible for money paid their principal after the ex-

piration of his term of office: *People v. Toomey*, 122 Ill. 308, 13 N. E. 521, affirming 25 Ill. App. 46.

B. Issuance of Warrants.—Where it is the duty of a clerk of a city or county to issue warrants for claims duly allowed by the proper board, the issuance of warrants which have not been allowed, or for a sum in excess of that allowed, constitutes a breach of his official bond. The fact that the warrant is drawn payable to himself does not change his act from an official to an individual one, nor does the negligence of another officer in countersigning or paying such warrant relieve the sureties of the clerk from liability: *Campbell v. People*, 154 Ill. 595, 39 N. E. 578, affirming 52 Ill. App. 338; *Spindler v. People*, 154 Ill. 637, 39 N. E. 580, affirming 51 Ill. App. 613; *Armington v. State*, 45 Ind. 10; *Allen v. State*, 6 Kan. App. 915, 51 Pac. 572; *People v. Treadway*, 17 Mich. 480; *Lewis v. State*, 65 Miss. 468, 4 South. 429. Where, however, a county clerk has no power to certify bills allowed by the county, his false certification of a bill in his favor can give a purchaser no right of action on his official bond: *Ottenstein v. Alpaugh*, 9 Neb. 237, 2 N. W. 219.

3. Acts of Clerk of Court in Ex-officio or Appointive Capacities.

A. As License or Tax Collector.—The undertaking of the sureties on the bond of a clerk of court covers, it is held in *Wilmington v. McNutt*, 78 N. C. 177, the performance by him of duties as license collector imposed subsequently to the execution of the bond, such duties being regarded as connected with and having relation to his existing duties. In *Auditor of Public Accounts v. Dryden*, 3 Leigh (Va.), 703, on the other hand, it was held that the sureties of a clerk of court were not liable for his defaults as ex-officio tax collector, although no separate bond was given by him in the latter capacity, the bond as clerk, in view of the history of the statutes of the state in this regard, covering only the clerical duties of the office. In the case of clerks of towns or counties who are ex-officio collectors of taxes and licenses, their official bonds as clerk are ordinarily held to cover their acts and defaults in their ex-officio capacity: *Orman v. City of Pueblo*, 8 Colo. 292, 6 Pac. 931; *Village of Allegan v. Chaddock*, 119 Mich. 688, 78 N. W. 892; *Van Valkenburgh v. City of Paterson*, 47 N. J. L. 146.

B. As Recorder, etc.—Where a separate bond is given by a clerk of court for the proper performance of his duties as ex-officio county recorder, his official bond as clerk is not answerable for fees received by him as recorder: *People v. Stewart*, 6 Ill. App. 62. In *State v. White*, 152 Mo. 416, 53 S. W. 1064, however, where the separate bond given by him as recorder was for "the faithful performance of all the duties enjoined on him by law as recorder and for the delivery up of the records, books, papers," etc., to his successor, while one of the duties required by statute of clerks who

were ex-officio recorders was to report all fees received by them as recorders, it was held that the bond as recorder covered only the delivery of the records to his successor, while the bonds as clerk covered the accounting for all fees received, although received as recorder. For a similar holding in the case of a county clerk who was ex-officio a clerk of the county court, giving separate bonds for his acts in each capacity, see *Satterfield v. People*, 104 Ill. 448.

C. Under Appointment by Court.

(1) **In General.**—The most frequent case in which there arises a question as to the liability of the sureties on the bond of a clerk for acts done by him in an appointive or ex-officio capacity is that in which a clerk of court acts under the appointment of court as a receiver or commissioner, or in the discharge of functions of a similar nature. To a great extent the question depends upon the statutory provisions in each state relating to the duties of clerks and the appointment of officers, such as receivers.

(2) **Where Separate Bond is Required.**—Where a separate bond is required of one who acts as special commissioner or in a similar capacity, a clerk acting as such commissioner acts under his special bond, and not under his general official bond as clerk of the court: *Alcorn v. State*, 57 Miss. 273. This may, of course, be changed by statute, and the bond of the officer as clerk of court made to cover his acts as commissioner, although he is required by law to give a special bond as commissioner: *Williams v. Bowman*, 3 Head (Tenn.) 678, under statute changing rule of *Waters v. Carrol*, 9 Yerg. (Tenn.) 102. The statute referred to in the case cited from Tennessee, passed in 1849, was held changed by a subsequent statute of that state passed in 1852, under which it was held that the sureties of a clerk of court as such were not liable for his acts as commissioner of sales: *State v. Blakemore*, 7 Heisk. (Tenn.) 638; unless, it seems, he had given no separate bond in the latter capacity: *Tanner v. Dancy*, 4 Heisk. 482. Where such separate bonds are given, the obligation of the sureties on the official bond covering his duties as commissioner are responsible only for moneys coming into his hands from sales made under the orders of court; for other moneys, however received, his bond as clerk is answerable: *State v. Blakemore*, 7 Heisk. (Tenn.) 638; *Bowen v. Evans*, 1 Lea (Tenn.), 107.

Similarly, where a clerk of court, although required to serve as administrator of an estate if appointed as such by the court, gives a separate bond to cover his duties as administrator, his general official bond as clerk does not, it is held in *McNeil v. Smith*, 55 Ga. 313, cover his delinquencies as administrator.

(3) **Where Separate Bond is not Required.**—Where a clerk of court is ex-officio a register or master in chancery, his official bond is, it is held, responsible for his acts as a commissioner in chancery.

in making a sale: *State v. Watson*, 38 Ark. 96; *Judges v. Deans*, 9 N. C. (2 Hawks) 93; especially where by statute the court is empowered "to appoint the clerk or some other fit person": *State v. Morrison*, 63 N. C. 508; *State v. Blair*, 76 N. C. 78. (Compare, also, *Broughton v. Haywood*, 61 N. C. 380.) See, also, *Fort v. Assman*, 88 S. C. 253, 16 S. E. 887. If, under such a statute, a clerk is appointed to make a sale, it is to be taken that he is appointed in his official capacity, unless this is negated by the words of the appointment: *State v. Morrison*, 63 N. C. 508.

The position of a master in chancery is in many regards incompatible with the exercise by him of the functions of receiver, so much so that in England his appointment as such is never permitted. In this country, however, the incompatibility has not been regarded so seriously, and in view of the practise of the courts in appointing masters in chancery as receivers, it was held in an early case in South Carolina (*Lowndes v. Pinckney*, 1 Rich. Eq. 155) that the official bond of a master in chancery as such was answerable for his defaults as receiver. In *Kerr v. Brandon*, 84 N. C. 128, under a statute authorizing the court to appoint "some discreet person" a receiver to take possession of the ward's estate on the removal of the guardian, an appointment of one who was clerk of court, but without reference to the office held by him, did not, it was held, render the sureties on his official bond as clerk liable for his acts as receiver. This led to a change of the statute, authorizing the court to appoint "the clerk of the superior court or some discreet person," and the official bond of the clerk as such has since been deemed to cover the duties devolving on him under an appointment as receiver: *Syme v. Bunting*, 91 N. C. 48; *State v. Boone*, 108 N. C. 78, 12 S. E. 897; *State v. Upchurch*, 110 N. C. 62, 14 S. E. 642; *Waters v. Melso*, 112 N. C. 89, 16 S. E. 918; distinguishing *Rogers v. Odums*, 86 N. C. 432. Whether or not the bond of a register or master in chancery covers his acts in the appointive capacity of receiver if funds are placed in his hands to be invested by him as receiver, until he does so invest them he holds the funds as register, and his official bond as such covers their proper disposition: *Coleman v. Ormond*, 60 Ala. 328; *McPhillips v. McGrath*, 117 Ala. 549, 23 South. 721.

e. *Auditors*.—Perhaps the most important of the duties usually assigned to a city or county auditor is the auditing of bills against the municipality and the issuance of warrants on the treasury for such as are allowed. In the issuing of such warrants he, of course, acts officially, and if he issues false or fraudulent ones, the fact that they are drawn payable to himself does not make his act extraofficial, or the less covered by his official bond. For such an act the sureties on the latter are answerable: *State v. Kent*, 53 Ind. 112; *Mahaska v. Buan*, 45 Iowa, 328; *Jones v. Commissioners of*

Lucas Co., 57 Ohio St. 189, 63 Am. St. Rep. 710, 48 N. E. 882. The attestation of fraudulent or overissued county bonds and their issuance by the county auditor is also a breach of his official bond: *National Bank of Redemption v. Rutledge*, 84 Fed. 400. Where funds are received by him which the law gave him no authority as auditor to receive, he holds them in his personal capacity, and his bondsmen cannot be held answerable therefor: *San Luis Obispo County v. Farnum*, 108 Cal. 562, 41 Pac. 445 (license fees); *State v. Bonner*, 72 Mo. 387 (school funds); *City of St. Louis v. Sickles*, 52 Mo. 122 (money received for disbursement); *State v. Moore*, 56 Neb. 82, 76 N. W. 474 (insurance fees). For money, on the other hand, which he was empowered to receive, as the proceeds of city bonds negotiated by him (*Stevenson v. Bay City*, 26 Mich. 44), or money received as ex-officio clerk of the board of county commissioners while acting as its purchasing agent (*County of Snohomish v. Ruff*, 15 Wash. 637, 47 Pac. 35, 441), his official bond is answerable.

f. Supervisors, Trustees, etc.—On the same principle the sureties of a town supervisor, county or township trustee, etc., while responsible for moneys which their principal is authorized by law to receive (*State v. Wright*, 50 Conn. 580), are not answerable for funds which he receives without any authority whatever derived from his office: *People v. Pennock*, 60 N. Y. 421. If, however, it be his duty as county trustee to collect the taxes of the county, the illegality of the tax furnishes his sureties no defense for his refusal to pay over the amount collected: *State v. Hays*, 99 Tenn. 542, 42 S. W. 266. See, also, III, b, 3, B, C. If the bond of such an officer is conditioned that he shall collect all moneys due the county or township as the case may be, his sureties are liable, it is held, for his failure to collect the amount of a shortage occurring during his predecessor's term, unless they show that it could not have been collected: *State v. Mock*, 21 Ind. App. 629, 52 N. E. 998. Being, however, answerable for his official acts only, they cannot be made responsible for his act in fraudulently securing from the auditor and cashing a warrant for his salary, when one warrant therefor had already been issued and negotiated: *State v. Keifer*, 120 Ind. 113, 22 N. E. 107. For the liability of a township trustee and his bondsmen under an Indiana statute rendering such an officer liable "personally and on his official bond" for the amount of any indebtedness he may contract in the name or in behalf of the township, except by order of the board of county commissioners, see *State v. Howes*, 112 Ind. 323, 14 N. E. 87; *State v. Helms*, 136 Ind. 122, 35 N. E. 893; *State v. Stout*, 26 Ind. App. 446, 59 N. E. 1091; *Stanton v. Shipley*, 27 Fed. 498; *State v. Glover*, 155 U. S. 513, 15 Sup. Ct. Rep. 186.

g. Public Inspectors, Superintendents, etc.

1. For Injuries from Failure to Inspect, etc.—Where a bond is required of a public inspector or superintendent, it is ordinarily held breached if through his failure to exercise due diligence in the performance of his duties. Thus, a superintendent of streets is liable on his official bond to one injured by his neglect to enforce the laws and ordinances relative to streets: *Goodsell v. Ashworth*, 96 Cal. 397, 31 Pac. 261; and in *County Court etc. v. Fasset*, 65 Mo. 418, the sureties on the bond of an inspector of coal-oil were held responsible for the death of the plaintiff's wife caused by the explosion of a lamp filled with a poor grade of oil, which the refiner had put into casks negligently branded "approved" by the inspector, while they were empty. In Kentucky, however, it was held in *Coleman v. Eaker*, 63 S. W. 484, that there could be no recovery on the bond of a county supervisor of roads for personal injuries resulting from the breaking of a bridge or culvert forming part of a public road. In the view of the court, liability for such injuries was not contemplated by the legislature in requiring the bond.

2. For Money Received by.—The official bonds of officers of this class, like those of any other, are responsible for moneys received by them as inspection fees, where their receipt is authorized by law. That the inspection was not performed is no defense for failure to turn over fees actually received: *Blaco v. State*, 58 Neb. 557, 78 N. W. 1056. In Illinois, if at the time of the execution of the bond the inspector of grain was not authorized to receive any fees for inspection, the sureties on the bond of such officer are not responsible for his failure to account for fees received under a law subsequently enacted, his duties in this respect not being regarded as germane to those imposed upon him at the time the bond was executed: *People v. Tompkins*, 74 Ill. 482. A bond executed subsequent to the enactment of the law providing for the collection of fees, is, however, security for his proper disposition of fees collected.

h. Judicial Officers.

1. In General.—Ordinarily, judicial officers are not required to give bonds for the faithful performance of their duties. These latter are in the main of a nature such that the sanctity of the official oath and the conscience of the officer must furnish the only guaranty of their conscientious performance. From justices of the peace, however, who, in addition to their judicial duties, are frequently invested with numerous ministerial functions, and whose duties in certain connections necessitate the receipt of money from third persons, an official bond is generally required. And in some states such a bond is exacted of judges of the courts having probate jurisdiction, and therefore charged with the administration and

control of the funds belonging to the estates of incompetents, decedents, etc.

2. Ministerial Acts.

A. Justice of Peace.—The ministerial acts required of a justice of the peace and the failure to perform or an erroneous performance of which renders liable the sureties on his official bond, are usually of the same nature as those which in the superior courts are made the duty of clerk of court to perform: See *supra*, 568-572. Thus, the sureties on the official bond have been held answerable for his failure to file an appeal within the period prescribed by law: *State v. Houston*, 4 Blackf. (Ind.) 291; for his failure to docket a judgment: *Larson v. Kelly*, 64 Minn. 51, 66 N. W. 130; *Fairchild v. Keith*, 29 Ohio St. 156; for his refusal to issue execution on a judgment in replevin: *State v. Carrick*, 70 Md. 586, 14 Am. St. Rep. 387, 7 Atl. 559. So the neglect of a justice of the peace to issue execution and collect a judgment, where required to do so by statute, constitutes a breach of his bond: *Carpenter v. Warner*, 38 Ohio St. 416; *Gaylor v. Hunt*, 23 Ohio St. 255. This neglect, however, can give rise to a cause of action on his official bond in favor of the judgment creditor only, and a surety of the debtor who has been compelled to pay the debt cannot recover from the sureties of the justice of the peace on the ground that if the latter had issued execution, the plaintiff's principal, being solvent at the time, would have paid the debt: *Dehu v. Heckman*, 12 Ohio St. 181. The sureties of a justice of the peace are responsible for his abuse of authority in unlawfully issuing execution under which the property of the plaintiff was sold: *Fox v. Meacham*, 6 Neb. 530. If, in attempting to take the undertaking of a judgment debtor to stay execution, a justice of the peace omits to write anything above the surety's name on the docket, the judgment creditor has no right of action on his official bond for such omission, since there was no damage as a legal result of it. There being no undertaking to stay execution, execution might have been taken out by the judgment creditor, and the neglect of the justice cannot be said to have made collection of the debt impossible: *Gaylor v. Hunt*, 23 Ohio St. 255.

B. Probate Judge, etc.—A probate judge whose duty it is under the law to keep an index of all deeds and mortgages is responsible on his official bond for the proper performance of this duty: *Norton v. Kumpe*, 121 Ala. 446, 25 South. 841. So his failure to issue a tax-roll to the tax collector when required to do so by statute is a failure to perform a ministerial duty, for which his sureties are answerable: *Branch v. Davis*, 29 Fed. 888. On the ground that the plaintiff in an action on an official bond must have a direct and proximate interest in the official act or omission complained of it was held in *Savage v. Matthews*, 98 Ala. 535, 13 South. 328, that

the sureties of a probate judge were not liable for his act in carelessly or fraudulently issuing an illegal warrant on the county treasurer, to one who had bought it, such warrants not having been intended for general circulation. The bondsmen of such a judge are responsible, however, where instead of ordering money in the hands of administrator to be invested, as required by law, he ordered it paid to himself and converted it, although he had no authority under the law to make the order: *Smith v. Lovell*, 2 Mont. 332. In accordance with principles already discussed (II, i), the sureties of a probate judge were in *Jeffreys v. Malone*, 105 Ala. 489, 17 South. 21, held not liable for a statutory penalty imposed by law on their principal for the improper issuance of a marriage license.

3. Judicial Acts.

A. General Rule.—It is quite naturally to the bonds of officers of the class now under consideration that the most frequent application is made of the principle already generally considered (II, e), that official bonds only cover acts which are not judicial in their nature. Accordingly, where the bond of a justice of the peace was conditioned for the due performance by him of his "judicial duties," it was held that the evident intent of the parties was that it should cover his "official duties," and that so read, it was breached only by a failure to perform or the improper performance of a ministerial duty: *Larson v. Kelly*, 64 Minn. 51, 66 N. W. 130.

B. What Deemed Judicial Acts.—In accordance with the general rule that acts of a judicial nature, however wrongful, do not constitute breaches of the official bond of an officer, it is held that the sureties on the bond of a justice of the peace are not responsible where their principal, in trying a cause, argued with the jury, or maliciously refused an appeal, unless certain persons were procured as sureties: *Irion v. Lewis*, 56 Ala. 190. Likewise, in making a commitment for contempt, he is deemed to act judicially, and however malicious his motive, his sureties are not answerable for his act: *Coleman v. Roberts*, 113 Ala. 323, 59 Am. St. Rep. 111, 21 South. 449. Where, however, before ordering an arrest in a civil action, a justice is by law required to take a bond from the petitioner, if he fails to do so, his omission is with respect to a ministerial duty, and constitutes a breach of his official bond: *Place v. Taylor*, 22 Ohio St. 317. Ordinarily, judicial action on the part of a justice of the peace is over when he has considered and determined the judgment to be rendered. Acts thereafter to be performed, such as the docketing of the judgment or issuance of execution, are ministerial duties for a failure to perform which his bondsmen are responsible: *Larson v. Kelly*, 64 Minn. 51, 66 N. W. 130. In the taxation of costs, however, a justice acts judicially: *State v. Jackson*, 68 Ind. 58. The bond of a justice is breached where

by his official bond, and for his conversion of them his bondsmen are answerable: *Hays v. People*, 3 Ill. App. 57; *Latham v. Brown*, 16 Iowa, 118; *Bessinger v. Dickerson*, 20 Iowa, 260. Where, however, he is not made a collecting agent by statutes of the nature referred to, if he receives claims for collection, he is deemed to do so in his individual capacity, and for his failure to collect or any other act or omission as a collection agent, his sureties are not responsible: *McGrew v. Governor*, 19 Ala. 89. For the money received by him, where, under statutes of this kind, claims have been left with him as a magistrate for collection, his sureties are responsible, although no process issued to compel payment and no judgment was rendered: *Widener v. State*, 43 Ind. 244; *Ditmars v. Commonwealth*, 47 Pa. St. 335. Where, on the other hand, the statute authorizes the receipt of money by a justice only when suit has been brought and judgment rendered on a claim, if money is received on a claim left with a justice for collection, without suit, it is received by him individually and as a collection agent, and is therefore not covered by his official bond: *McCormick v. Thompson*, 10 Neb. 484, 6 N. W. 597; *Stevens v. Breatheven*, *Wright (Ohio)*, 733; *Commonwealth v. Kendig*, 2 Pa. St. 448.

(2) *In Satisfaction of Judgment.*—Where the money is received by a justice in satisfaction of a judgment rendered by him, it is received officially, and for its conversion he is responsible on his official bond: *People v. Price*, 3 Ill. App. 15; *Price v. Farrar*, 5 Ill. App. 536; *Wright v. Harris*, 31 Iowa, 272; *Brockett v. Martin*, 11 Kan. 378; *Peabody v. State*, 4 Ohio St. 387; *Walter v. Zeigler*, 8 Kulp, 25; *Ferry v. Schultzer*, 8 Kulp, 64. See, also, *Green v. Wardwall*, 17 Ill. 278, 63 Am. Dec. 366; *State v. Bliss*, 19 Ind. App. 662, 49 N. E. 1077. Under the Alabama statute making the official bondsmen of an officer liable for his acts *colore officii*, the sureties of a notary acting as *ex-officio* justice of the peace are, it is held, liable for money received by him under a false claim that he had rendered judgment against a party: *Mason v. Crabtree*, 71 Ala. 479. Where a justice assuming to act officially, renders judgment on claims in his hands, it is held that he thereby abandons any agency in respect to such claims if he ever occupied that position, and his sureties are estopped by the docket of their principal from showing that he acted in their collection as an agent merely: *Price v. Farrar*, 5 Ill. App. 536.

In *Hale v. Commonwealth*, 8 Pa. St. 415, the sureties of a justice of the peace were held responsible for his conversion of money paid on a judgment confessed, although in amount it exceeded the jurisdiction of the justice. In *Barnes v. Whitaker*, 45 Wis. 204, on the other hand, the doctrine that the bondsmen of a public officer are not responsible for his extraofficial acts or personal trespasses is carried to the extent of holding that, where certain judgments rendered by a justice of the peace in attachment suits were held void by the appellate court, on the ground that the affidavits for

the warrants of attachment were so defective that the justice never acquired jurisdiction, if the justice had received money as the proceeds of executions issued on such judgments he received them not "by virtue of his office," but by a personal trespass, and the sureties on his official bond were not responsible for his disposition of such money.

5. Acts in Ex-officio or Appointive Capacity.—Where a probate judge is ex-officio county treasurer, where the statutes, while referring to the liability of the treasurer on his official bond, make no provision for a separate bond to be given to cover the acts of the officer in his capacity as treasurer, his bond as probate judge will be deemed to cover his acts in the ex-officio capacity as treasurer: *Clay Co. v. Simonsen*, 1 Dak. 403, 46 N. W. 592. If, however, the statute requires that his bond be conditioned for the faithful performance of his duties "as judge of probate, ex-officio justice of the peace and county treasurer," a bond conditioned merely for the performance of his duties "as judge of probate" does not cover his delinquencies as county treasurer: *Territory v. Ritter*, 1 Wyo. 318. The sureties on the bond of a county judge, as such, are not responsible for his misappropriation of the proceeds of school lands sold by him as an appointee of the commissioner's court: *Henderson Co. v. Richardson*, 15 Tex. Civ. App. 699, 40 S. W. 38. In West Virginia a justice of the peace is by statute made liable on his official bond for the consequences of any default of a special constable appointed by him. Under this statute the sureties on the bond of a justice have been held answerable for the statutory "damages" incurred by a special constable who sold property exempt from execution: *State v. Allen*, 48 W. Va. 154, 86 Am. St. Rep. 29, 35 S. E. 990.

1. Notaries Public.—The liability of the sureties on the official bond of a notary public having been treated quite recently and at length in the monographic note to *Joost v. Craig*, 82 Am St. Rep. 380-388, on the liability of notaries, its consideration here is unnecessary. For questions as to the acts for which the sureties of such an officer are liable, the reader is referred to the note mentioned.

j. Conclusion.—In addition to a discussion of the general principles determining the acts for which the sureties of public officers are liable, the application of these principles to the more important classes of such officials has now been considered. There are, of course, others ranging in importance from wharfingers to United States consuls, but a detailed consideration of the various acts which in the case of each officer is held to render liable the sureties on his official bond could serve no useful purpose, and will not, therefore, be here attempted.

CLOSE v. RIDDLE.

[40 Or. 592, 67 Pac. 932.]

INTEREST After the Breach of a Contract, is recoverable only as damages. (p. 583.)

INTEREST—Higher Rate After Default.—A stipulation in a bond and mortgage for a higher rate of interest after maturity, such rate not being usurious, is for liquidated damages, and not a penalty, and is enforceable in equity. (p. 583.)

MORTGAGE FORECLOSURE—Disposal of Proceeds.—Directing the remainder of the proceeds of a mortgage foreclosure, after satisfying the sum due the plaintiff, to be deposited in court subject to its further order, is not reversible error. (pp. 583, 584.)

Suit to foreclose a mortgage. The complaint alleges that on May 21, 1888, the defendants, George W. Riddle and his wife, executed a bond to the Lombard Investment Company for eleven thousand dollars, due in five years, with interest at six per cent, payable semi-annually, evidenced by ten coupons of three hundred and thirty dollars each, and stipulating for eight per cent interest after maturity; that at the same time they and W. H. Riddle, to secure the payment of such principal and interest, executed to the company a mortgage on certain property, which mortgage, with the bond, was assigned to the plaintiff; that W. H. Riddle devised his interest in the realty to George W. Riddle and wife, and his estate was duly settled in the probate court; that the other defendants claim some interest in the mortgaged premises, but their rights, if any, are subordinate to the plaintiffs; that no part of the debt has been paid except the coupons and the sum of fifteen hundred dollars, on the principal and interest thereon to June 1, 1897; and prays for the recovery of nine thousand five hundred dollars, with interest from that date at the rate of eight per cent per annum, and for a decree foreclosing the mortgage.

The defendant Walter S. Riddle, alone answering, denies that there is due on the mortgage any greater sum than seven thousand eight hundred dollars. And for a separate defense he alleges that on July 28, 1891, the defendants George W. Riddle and his wife executed to Stilly Riddle their mortgage upon said premises to secure the sum of seven thousand five hundred dollars, and they also conveyed a part of said premises to W. H. Taylor, whereupon Stilly Riddle released the lien of his mortgage upon the land so conveyed, and thereafter assigned

his mortgage to this defendant, who secured a decree foreclosing the same, in pursuance of which the remaining premises were sold to him, and, the sale having been confirmed, a sheriff's deed therefor was executed to him; that the title to the premises so conveyed to Taylor has passed by mesne conveyances to the defendants Samuel Parmley and Clara S., his wife; that on August 19, 1899, this defendant paid on account of the bond so assigned to plaintiff the sum of six hundred dollars; and that the stipulation in the bond and mortgage to pay eight per cent interest on the debt after its maturity is void; and prays that the land so conveyed to Parmley and wife be first sold, and the proceeds arising therefrom applied upon plaintiff's demand, and, if sufficient to satisfy the same, that the premises so owned by this defendant be freed from the lien of said mortgage. The reply having put in issue the allegations of new matter in the answer, a trial was had, and the court found that, after giving said defendant credit for the sum of six hundred dollars, there remained due on the bond the sum of eleven thousand two hundred and seventy dollars and seventy-six cents, and decreed a foreclosure of the mortgage and a sale of the premises, the part so conveyed to Taylor to be sold first, and that, if any of the proceeds thereof remain after the payment of the sum so found due plaintiff, it be deposited in court to be paid out on its further order, and the defendant Walter S. Riddle appeals.

J. C. Fullerton, for the appellant.

Milton W. Smith, for the respondent.

⁵³⁵ MOORE, J. 1. It is contended by appellant's counsel that the stipulation in the bond and mortgage for the payment of eight per cent interest after the maturity of the debt is a penalty designed to secure the payment of a lesser rate of interest, and, this being so, it should not be enforced in equity, and that the court erred in decreeing the recovery of more than six per cent, and cites in support of the principle insisted upon the case of *Mason v. Callender*, 2 Minn. 350. 72 Am. Dec. 102, in ⁵³⁶ which it was held by the supreme court of Minnesota that an agreement to pay a greater sum on default in the payment of a lesser was a penalty, and not liquidated damages, and could not be recovered, and that this rule applies to a stipulation in a note providing for an increased rate of interest after maturity upon both principal and interest. While the decisions upon this subject are not uniform,

we think the great preponderance of authority supports the rule that, where a higher rate of interest is expressly reserved to be paid after maturity, the rate so stipulated is recoverable if not usurious: 2 Edwards on Bills and Notes, sec. 1005; 3 Randolph on Commercial Paper, 2d ed., sec. 1713. The editors of the American and English Encyclopedia of Law (volume 16, second edition, page 1049), in discussing this question, say: "By the weight of authority a stipulation for a higher rate of interest after maturity is valid and enforceable, provided the increased rate which it is sought to recover does not exceed the highest rate allowed by law; and, in the absence of a statute limiting the rate which may be contracted for, or where the rate provided for after maturity is not unlawful, a stipulation for a higher rate after maturity will generally be considered as a liquidation of the damages, rather than as a penalty for a breach." The statute of this state permits the recovery of ten per cent interest per annum by express agreement of the parties (Hill's Annotated Laws, sec. 3587); so that the stipulation in the bond and mortgage to pay eight per cent interest per annum after maturity is not usurious. Interest is compensation for the use or forbearance of money, or for withholding from or depriving a party of money: 16 Am. & Eng. Ency. of Law, 2d ed., 990.

Interest proper would seem to be the compensation agreed to be paid by the borrower to the lender for the use of money to be paid at a future day, while the compensation awarded by law for the forbearance or withholding money is denominated "damages," the measure of which is established at a given rate. The statute prescribing the rate of compensation by way of damages is as follows: "The rate of interest in this state shall be six per centum per annum, and no more, on all moneys ⁵⁹⁷ after the same become due; on judgments and decrees for the payment of money; on money received to the use of another and retained beyond a reasonable time without the owner's consent, express or implied, or on money due upon the settlement of matured accounts from the day the balance is ascertained": Hill's Annotated Laws, sec. 3587, as amended October 14, 1898; Laws 1898, p. 15. It will be observed that the statute employs the word "interest" instead of "damages," but the term so selected cannot change the character of the compensation awarded; for after the breach of a contract interest is never recoverable except as damages: Seton v. Hoyt, 34 Or. 266, 75 Am. St. Rep. 641, 55 Pac. 967; Mason v. Cal-

lender, 2 Minn. 350, 72 Am. Dec. 102; *Jourolmon v. Ewing*, 80 Fed. 604; *Brainard v. Jones*, 18 N. Y. 35. In the case at bar, the makers of the bond having neglected to pay the sum due thereon at maturity, damages necessarily resulted, which should be measured, in the absence of any stipulation to the contrary, by the rate specified in the bond as compensation for the use of the money prior to the breach of the contract: *Hill's Annotated Laws*, sec. 3591. Such damages, however, are properly anticipated and adjusted by the parties, and, if the rate thus agreed to be paid for the use of money after maturity does not exceed the highest rate prescribed by law, the agreement, by the great weight of authority, is for liquidated damages, and not in the nature of a penalty, and, the parties having agreed upon the payment of a rate recoverable by express contract, no error was committed in assessing the damages so agreed upon.

2. It is maintained that the appellant was entitled to the remainder of the proceeds arising from a sale of the mortgaged premises after satisfying the sum found to be due the plaintiff, and hence an error was committed in decreeing that such remainder should be deposited in court subject to its further order. It will be remembered that Samuel Parmley and wife owned a part of said land in fee, subject to plaintiff's mortgage, which was decreed to be sold first. If the sum realized from such sale was more than sufficient to satisfy plaintiff's ~~see~~ decree, no necessity would exist for a resort to the appellant's land, and the remainder of the proceeds, if any, would belong to Parmley and his wife; but, if insufficient for that purpose, and the sale of appellant's land became necessary, any sum that remained after paying plaintiff the amount of his decree would belong to the appellant. A sale of real property under a decree of foreclosure is conducted in the same manner as a sale thereof under an execution in an action: *Hill's Annotated Laws*, sec. 417. Upon a return of the execution the sheriff shall pay the proceeds of the sale to the clerk, who shall then apply the same, or so much thereof as may be necessary, to the satisfaction of the judgment; and if any of the proceeds then remain, the clerk shall pay the same to the judgment debtor or his representative: *Hill's Annotated Laws*, sec. 296, subds. 3, 5. It is quite probable that, if the decree had been silent in respect to the payment of such remainder after the satisfaction of plaintiff's demand, the clerk would have been authorized to pay the same to the party entitled

thereto. It would undoubtedly have been better practise if the decree had designated the party to whom it should be paid; but, as the undertaking on appeal did not stay the enforcement of the decree, it is possible that a sale of the premises may have been made, and, if so, and any remainder exists, the necessity of securing the court's order therefor, as prescribed in the decree, if erroneous, is not, in our judgment, so prejudicial as to require a modification thereof.

There are other errors alleged, but we do not consider them of sufficient importance to require consideration, and hence the decree is affirmed.

AGREEMENTS FOR A HIGHER OR AN EXORBITANT RATE OF INTEREST AFTER DEFAULT.*

I. Cases Questioning the Validity of Such Agreements.

II. The Prevailing Trend of the Decisions.

1. Where the Stipulated Interest Runs from Maturity of Debt.

2. Where It Relates to and Runs from Date of Debt.

III. Whether Such Transactions are Usurious.

IV. Waiver of the Stipulation.

I. Cases Questioning the Validity of Such Agreements.

The decided cases are not entirely harmonious on the question passed upon in the principal case. Some authorities regard a stipulation in a note, bond, or other agreement, for a higher rate of interest in case of default in payment at maturity, as an agreement for a penalty, and therefore not enforceable. Other authorities considered the stipulation as an agreement for liquidated damages, and give it effect. In determining whether the amount stipulated in a contract to be paid in the event of a failure to comply therewith is to be treated as an agreement for liquidated damages or as a penalty, courts are often guided by this general rule: If the actual damages resulting from a failure of compliance with a contract are definitely fixed by some rule of law, and easily ascertainable by the appropriate rules of evidence, and the sum named is out of proportion to the real damage, the stipulated amount is a penalty; but if the damages are uncertain and insusceptible of ready ascertainment, and the sum fixed as damages is not unreasonable, it is liquidated damages: See *Taylor v. Times Newspaper Co.*, 83 Minn. 523, 85 Am. St. Rep. 473, 86 N. W. 760; *Salem v. Anson*, 40 Or. 339, ante, p. 485, 67 Pac. 190.

*REFERENCE TO MONOGRAPHIC NOTES.

Penalties and liquidated damages distinguished: 1 Am. Dec. 331-340; 30 Am. Rep. 25-34.

Under this rule of construction, a stipulation for a higher rate of interest after default provides a penalty, since for the nonpayment of money when due the law allows interest at the legal rate as damages. There is, then, no difficulty in determining the damages in such a case. The measure thereof is simply the legal interest: See *Brown v. Mauleby*, 17 Ind. 10; *Mason v. Callender*, 2 Minn. 350, 72 Am. Dec. 102; *Talcott v. Marston*, 3 Minn. 339; *Holbrook v. Sims*, 39 Minn. 122, 39 N. W. 74, 140; *Krutz v. Robbins*, 12 Wash. 7, 50 Am. St. Rep. 871, 40 Pac. 415. In this last case, the higher rate of interest was provided, not only for default in payment of the principal, but for default in the payment of interest or insurance or taxes. Besides, the obligation, which was a mortgage, was to draw the increased rate from the date of the note. In the first cited Minnesota case, the stipulation was for an increased rate after maturity upon both principal and interest. While in the Indiana case the note provided that "we agree to forfeit and pay twenty per cent damages for disappointment, waiving valuation and appraisement laws." It was held that the note did not fall under the class of covenants or promises to which the doctrines of penalty and liquidated damages apply. For where the payment of a sum of money is the act to be done, no nearer approximation to the damages suffered by its omission can be arrived at than the legal rate of interest; and this is the rule of damages the law has fixed for delay in paying money.

"It would certainly be against public policy," said the court, "would have the effect to abrogate all laws against usury, and place the weak and embarrassed entirely in the power of the money capital of the land, should such a stipulation as that contained in the note sued on be held valid." The hardship consequent upon giving effect to stipulations of this kind is an aspect of the question that appeals, and justly so, to courts with no inconsiderable force. "I think in all cases," observes Justice Eakin in his dissenting opinion to *Portis v. Merrill*, 33 Ark. 416, 420, "agreements for increased interest after maturity, or for exorbitant interest then to commence, especially when there is no reciprocal obligation on the part of the creditor to allow the debtor the use of the money at the increased rate for a definite time, are penalties in their very nature and essence, at least prima facie. They bear indubitable marks of intention to secure prompt payment to avoid worse consequences. The debtor never calculates upon really paying them. He is too apt to be sanguine with regard to his resources and chances of business, hopes to pay at maturity, and often is not in a mental condition to make cool calculations. He improvidently puts himself into a situation where disappointment as to his means is attended with the most shocking annoyances. This is more apt to occur where there is no legal restriction upon conventional interest, and courts of equity, in such cases, should rather increase their vigilance than renounce

their powers. I think, in this case, the offer to pay the full amount of the note, with legal interest after maturity, was quite enough, and relief should be granted." The note provided for five per cent interest per month after maturity.

The only English case bearing on this question that has come under our observation is *Herbert v. Salisbury etc. Ry. Co.*, L. R. 2 Eq. 221. It is there held that an agreement entered into by a vendor and vendee, whereby the rate of interest on the purchase money is to be four per cent up to a certain date, five per cent for the next half year, and eight per cent for every subsequent year, is a good contract. In the course of the opinion, however, it is remarked that the "law upon the subject is unquestionably somewhat refined, and leads to very nice distinctions. For instance, it is quite clear that if a mortgagor agrees to pay five or six per cent interest, and the mortgagee agrees to take less, say four per cent, if it is paid punctually, that is a perfectly good agreement; but if the mortgage interest is at four per cent, and there is an agreement that if it is not paid punctually, five or six per cent interest shall be paid, that is in the nature of a penalty which this court will relieve against. I am of the opinion, however, that the stipulation in this contract . . . is not in the nature of a penalty, but a separate and distinct contract."

II. The Prevailing Trend of the Decisions.

1. Where the Stipulated Interest Runs from Maturity of Debt.—While the above authorities show a decided inclination to pronounce stipulations for an increased rate of interest after maturity penalties, such stipulations are, according to the consensus of judicial opinion, valid agreements to which effect will be given if the higher rate is lawful and not in contravention of the usury laws. Such agreements are often spoken of as in liquidation of damages, and not strictly penalties for the nonperformance of the contract. If it is urged that after default the law fixes the rate of interest, it may be said that no valid reason appears why the parties may not fix the rate after as well as before, maturity. And if the hardship of the doctrine is invoked, or if that rule of construction is contended for that when there is no difficulty in ascertaining the damages suffered from the breach of a contract, then an agreement by the parties to liquidate them in advance is in the nature of a penalty—the answer is that the cardinal rule of construction is to ascertain the intent of the parties, and give it effect when it clearly appears; and that the province of courts is not to make contracts, nor relieve the parties from their unwise and improvident agreements, if not unconscionable or tainted with fraud, duress, or the like: *Miller v. Kempner*, 32 Ark. 573; *Thompson v. Gorner*, 104 Cal. 168, 43 Am. St. Rep. 81, 37 Pac. 900; *Hubbard v. Callahan*, 42 Conn. 524, 19 Am. Rep. 564; *Wilkerson v. Daniels*, 1 G. Greene (Iowa), 180; *Sheldon v. Pruessner*, 52 Kan. 579, 35 Pac. 201; *Brown v. Cory*,

9 Kan. App. 702, 59 Pac. 1097; Capen v. Crowell, 66 Me. 282; Home Fire Ins. Co. v. Fitch, 52 Neb. 88, 71 N. W. 940; Crapo v. Hefner, 53 Neb. 251, 73 N. W. 702; McLane v. Abrams, 2 Nev. 199, 204; Close v. Riddle (the principal case), ante, p. 580; Wortman v. Vorhies, 14 Wash. 152, 44 Pac. 129; Haywood v. Miller, 14 Wash. 660, 45 Pac. 307.

"The fact that the creditor is content with a lower rate before maturity does not affect his right to demand under a special agreement a higher rate, not exceeding the limit fixed by law, after maturity": Pass v. Shine, 113 N. C. 284, 18 S. E. 251. "Where a note provides for a lawful rate of interest from date to maturity, and a higher and lawful rate of interest afterward, the rate of interest which the note draws from its date to maturity, and the rate which the note draws after maturity, are both the contract rates of the parties, and, since they are lawful, are enforceable": Havemeyer v. Paul, 45 Neb. 373, 63 N. W. 932, overruling Richardson v. Campbell, 34 Neb. 181, 33 Am. St. Rep. 638, 51 N. W. 753.

It is the duty of the court, in computing the amount due on the note, to allow interest until maturity at the lower rate, and thereafter at the higher: Omaha Loan etc. Co. v. Hanson, 46 Neb. 870, 65 N. W. 1058. And it is held that the holder of the note is entitled to the higher rate both before and after judgment, and until the debt is paid: Linton v. National Life Ins. Co., 104 Fed. 584.

Some promissory notes, not bearing interest from date, contain a provision that if not punctually paid at maturity, they shall thereafter draw a high, usually an exorbitant, rate of interest. Such provisions have been considered enforceable as agreements to liquidate damages for a breach of contract: See Portis v. Merrill, 33 Ark. 416; Smith v. Whitaker, 23 Ill. 367; Witherow v. Briggs, 67 Ill. 96; Davis v. Hendrie, 1 Mont. 499. In Bane v. Gridley, 67 Ill. 388, the note under consideration stipulated for thirty per cent per annum after maturity "as liquidated damages." The court said: "It is urged by counsel that the rate of interest which the note was to draw after maturity was a penalty to secure the payment of a smaller sum, and therefore to be relieved against in chancery, and not to be recovered at law. . . . But in cases like the one at bar, this court has evidently treated the increased interest as merely liquidated damages accruing from day to day, of which the party can, at any time, relieve himself by payment, and therefore involving, ordinarily, no special hardship calling for interference by the courts."

2. Where It Relates to and Runs from Date of Debt.—Though a note providing for a legal rate of interest until maturity, and for a higher but still legal rate after maturity is, at least by the great weight of authority, valid and enforceable according to its terms, it has been held that a provision for a legal rate until maturity, and, if the note should not then be paid, a higher rate from the date of the note, is, so far as it provides for a higher rate before maturity, in the

nature of a penalty, and will not be enforced: *Hallam v. Telseren*, 35 Neb. 255, 75 N. W. 560, citing *Holles v. Wyse*, 2 Vern. 289; *Strode v. Parker*, 2 Vern. 316; *Orr v. Churchill*, 1 H. Black. 227; *Seton v. Slaña*, 7 Ves. 273. We certainly have no contest, on principle, with the doctrine advanced by the Nebraska court. Other courts, however, have come to quite a different conclusion. It has been decided that a stipulation to pay a certain rate of interest if paid at maturity, but if not paid then, to pay a higher rate from the date of the note, is not a penalty, but an agreement to pay a higher rate on a contingency, and is enforceable: *Finger v. McCaughey*, 114 Cal. 64, 45 Pac. 1004; *McKay v. Belknap Sav. Bank*, 27 Colo. 50, 59 Pac. 745; *Daggett v. Pratt*, 15 Mass. 177; *Scottish-American Mortg. Co. v. Wilson*, 24 Fed. 310.

The cases are numerous which hold that a stipulation in a note or other obligation for interest from the date of such obligation, if not paid at maturity, is valid. Instruments of this class do not provide for interest if paid when due, though the day of their maturity is sometimes fixed at a very brief time after date: *Alexander v. Troutman*, 1 Ga. 469; *Reeves v. Stipp*, 91 Ill. 609; *Hackensberry v. Shaw*, 11 Ind. 892; *Horn v. Nash*, 204, 63 Am. Dec. 437, and note; *Bumsey v. Matthews*, 1 Bibb (Ky.), 242; *Glover v. Doty*, 1 Rob. (La.) 180; *Lalande v. Breauz*, 5 La. Ann. 506; *Rogers v. Sample*, 38 Miss. 310, 69 Am. Dec. 349; *Satterwhite v. McKie*, Harp. (S. C.) 397; *McNairy v. Bell*, 1 Yerg. (Tenn.) 502, 24 Am. Dec. 454. On the other hand, it is held in *Waller v. Long*, 6 Munt. (Va.) 71, that such an agreement provides for a penalty, and the interest is not recoverable: See, too, *Fugua v. Carriel*, Minor (Ala.), 170, 12 Am. Dec. 46. In *Flanders v. Chamberlain*, 24 Mich. 805, 816, when this question was under consideration, Justice Christianity said: "As this note shows upon its face that it was to draw no interest before maturity, if then paid, it is claimed that this is in the nature of a penalty; and in an ordinary case, when a note is given for a precedent debt, I am strongly inclined to think such a provision for interest from date, at ten per cent, if not paid when due, ought to be treated as a penalty rather than as stipulated damages for nonpayment at the day. But it is shown that this note was given for property sold on these specific terms, such being the condition of the sale; and undoubtedly a vendor has a right to refuse to sell except upon this or any other condition, and such being the condition of the sale in pursuance of which the note was given, I think it must draw interest from date at the rate mentioned."

III. Whether Such Transactions are Usurious.

We have now to consider the effect of usury statutes on agreements for exorbitant interest in case of default. This question is not raised in many of the decisions. In some of the recent cases

the rule that a higher rate may be contracted for after default is stated with the qualification, or at least the strong implication, that the stipulated rate must be lawful and not in excess of the maximum rate allowed by statute: See *Crapo v. Hefner*, 53 Neb. 251, 73 N. W. 702; *Close v. Riddle* (the principal case), ante, p. 580; *Linton v. National Life Ins. Co.*, 104 Fed. 584. This seems a most reasonable limitation on the rule. Nevertheless, there are authorities holding that an agreement in a note to pay more than legal interest after it is due, by way of penalty or as liquidated damages, if the debt is not paid punctually, is not usurious: *Walker v. Abt*, 83 Ill. 226; *Gembrill v. Rose*, 8 Blackf. (Ind.) 140, 44 Am. Dec. 760; *Gower v. Carter*, 3 Iowa, 244, 66 Am. Dec. 71; *Conrad v. Gibbon*, 29 Iowa, 120. "This court has repeatedly held," said Justice Scott in *Downey v. Beach*, 78 Ill. 53, "that contracts like this one are not usurious, if made with a single purpose to secure prompt payment of the principal sum. Although the party agrees to pay a rate of interest in excess of that allowed by statute, after maturity, it is, nevertheless, regarded as in the nature of a penalty to secure prompt payment. In such cases the penalty is liquidated damages fixed by the solemn agreement of the parties. When made for the sole purpose of securing prompt payment, and understandingly entered into, such contracts are valid at law, and may be enforced." In *Fisher v. Anderson*, 25 Iowa, 28, 95 Am. Dec. 761, it is adjudged that a promissory note is not usurious which stipulates that the principal shall draw more than the legal rate from date, if the note is not paid when due, unless it appears that interest has been included in the face of the note, and a recovery thereon is sought as well as on the principal.

IV. Waiver of the Stipulation.

The benefit of a provision in a promissory note for an increased rate of interest, if payments are not made when due, may be lost by waiver. By accepting the original rate the payee waives his right to collect a greater rate for the time past, but not to demand the increased rate for the future: *Thompson v. Gerner*, 104 Cal. 168, 43 Am. St. Rep. 81, 37 Pac. 900. And if the payee of a note which provides that if not paid when due the maker shall pay five per cent a month as damages from its maturity, accepts interest from time to time at the rate of ten per cent per annum until the death of the maker, he will be held to have waived his right to the damages stipulated for: *Bradford v. Holles*, 66 Ill. 517. But if the payee in a note bearing ten per cent interest from date until due and fifteen per cent thereafter if not then paid, being pressed not to sue soon after the note falls due, promises that he will not sue as long as he can help it, but gives no definite time, this is not a waiver of his right to exact the increased rate as damages for non-payment at maturity: *Funk v. Buck*, 91 Ill. 575.

CASES
IN THE
SUPREME COURT
OF
RHODE ISLAND.

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY
v. TUCKER.

[23 R. I. 1, 49 Atl. 26.]

INTERPLEADER.—The Office of an Interpleading suit is not to protect a party against a double liability, but against double vexation in the case of one liability. (p. 592.)

INSURANCE CORPORATION—When Cannot Compel Claimants Under Two Policies to Interplead.—If a life insurance company issues a policy upon the life of A, payable to B, but if B should not survive A, then to B's children, and permits B, then having children, to assign to A, and thereupon issues a new policy payable to the estate of A, the corporation cannot, on the death of A, maintain a bill of interpleader against the persons claiming under the two policies, because it may be liable on both. (p. 592.)

Chester W. Barrows, for the complainant.

Dexter B. Potter, Joseph W. Sweeney, Henry M. Boss, Jr., James A. Williams, and John S. Murdock, for the respondents.

¹ **ROGERS, J.** This is a bill of interpleader heard on bill and answers as to whether the parties respondent shall be ordered to interplead.

² The bill avers that on July 19, 1864, on the application of Olive A. Pinkham, wife of Hervey Pinkham, a policy of insurance, No. 38,520, was issued by the complainant upon the life of said Hervey for two thousand dollars, payable to said Olive, if living, and in case of the death of said Olive before the decease of said Hervey, the amount of said insurance to be payable after her death to her children for their use, within ninety days after proof of death of said Hervey furnished to

said complainant; that on August 4, 1869, said Olive assigned all her right, title and interest under said policy to her husband, the said Hervey, and of this assignment said complainant had notice August 6, 1869; that at the time of the assignment from said Olive to said Hervey on August 4, 1869, there were living, issue of said Olive, a son, the respondent Frederick Pinkham, and a daughter, Julia F. Pinkham, the said Frederick and Julia being the only children ever born to said Olive and said Hervey; that on said August 6, 1869, said Hervey gave the complainant notice of said assignment by said Olive to him, and transmitted said policy to complainant with the request that a policy be reissued bearing the same date, number, and amount as the said surrendered policy, but payable to the estate of said Hervey, and that the complainant did on August 9, 1869, in accordance with said request, and with no notice or knowledge of any other equities in said policy, issue a new policy in manner and form as requested by said Hervey; that on July 19, 1869, said Hervey assigned all his right, title, and interest in and to said policy No. 38,520 to the respondent Darius Pinkham, and of this assignment said complainant was first notified January 14, 1879; that April 1, 1887, said Darius made a certain promissory note to the respondent Ulysses Racine, purporting to give said Ulysses a lien on the proceeds of said policy, and in addition thereto said Darius pledged said policy to said Ulysses as security for the payment of said note; that March 10, 1894, said Darius assigned said policy No. 38,520 to said respondent James Tucker, of which assignment said complainant had notice on March 18, 1895; that the said Olive died in 1887; that said Hervey died July 2, ^a 1890, intestate, and that said policy became a claim against the complainant, according to the terms thereof, for the sum of nineteen hundred and eighteen dollars and two cents, which it averred it had then and has always since been ready and willing to pay to the parties legally entitled to have and receive the same; that on July 10, 1900, said respondent Tucker, and on August 4, 1900, said respondent Ulysses Racine, respectively, made claim upon the complainant for the payment of the proceeds of said policy to them, respectively, and that said respondent Ulysses Racine began suit on August 30, 1900, against the said Darius Pinkham to recover the balance due on said promissory note, and therein summoned the complainant as trustee of the said Darius Pinkham; that on or about May 26, 1880, said Julia F.

Pinkham, who had previously intermarried with one W. C. G. Phetteplace, died intestate, and that the respondent Ratcliffe G. E. Hicks has been duly appointed administrator on her estate, and has qualified as such, and that the respondent Frederick A. Jones has been duly appointed administrator on the said Hervey Pinkham's estate, and has qualified as such. The complainant asks for leave to pay said sum of nineteen hundred and eighteen dollars and two cents into the registry of the court, and that the several respondents be required to interplead. The respondents have severally filed answers, some claiming under said policy No. 38,520, as originally issued, and some under the substituted policy No. 38,520; and the question before the court is whether this is a proper case for interpleader.

It is apparent from the terms of the policy that it was payable to Mrs. Olive A. Pinkham only in case she survived her husband, Hervey Pinkham; and in case her husband survived her, it is expressly provided that the policy shall be payable to her children. It is not disputed that Mrs. Pinkham died before her husband, and that her son, the respondent Frederick Pinkham, not having joined in any assignment of his beneficial interest in policy No. 38,520, as originally issued, is claiming here under that policy. So, too, we understand that the respondent Hicks, administrator of the estate of Julia F. Phetteplace, a deceased daughter of the said Olive A. and Hervey Pinkham, is also claiming under ⁴ said policy as originally issued: See *Connecticut Mut. Life Ins. Co. v. Baldwin*, 15 R. I. 106, 23 Atl. 105; *Connecticut Mut. Life Ins. Co. v. Burroughs*, 34 Conn. 305, 91 Am. Dec. 705; *Knickerbocker Life Ins. Co. v. Weitz*, 99 Mass. 157.

On the other hand, all the other parties respondent, and if not all, some of them, at least, claim under the policy as re-issued. By issuing the two policies the complainant has exposed itself to claims under both, and must meet them as best it can. If the complainant created a new liability upon itself by issuing the second policy without obtaining a sufficient discharge from the original policy, it would be its own fault. This is not a case of a double demand of one duty; but it is a case in which there may be two liabilities.

Says Sir James Wigram, vice-chancellor, in *Crawford v. Fisher*, 1 Hare, 436, 441: "The office of an interpleading suit is not to protect a party against a double liability, but against

double vexation in respect of one liability. If the circumstances of a case show that the plaintiff is liable to both claimants, that is no case for interpleader. It is of the essence of an interpleading suit that the plaintiff shall be liable to one only of the claimants; and the relief which the court affords him is against the vexation of two proceedings on a matter which may be settled in a single suit."

In *National Life Ins. Co. v. Pingrey*, 141 Mass. 411, 6 N. E. 93, where the facts were practically identical with those in the case at bar, the supreme judicial court of Massachusetts held that a bill of interpleader could not be maintained: See, also, *Greene v. Mumford*, 4 R. I. 313; *Crawshay v. Thornton*, 2 Mylne & C. 1; *Jew v. Wood*, 1 Craig & P. 185; *Desborough v. Harris*, 5 De Gex, M. & G. 439; *Baker v. Bank of Australasia*, 1 Com. B., N. S., 515.

In our opinion, the complainant cannot have an order that the respondents interplead when one important question to be tried is whether by reason of its own act it is under different liabilities to more than one of these respondents. Upon such a question the complainant ought to be in a position to be heard; but on a bill of interpleader, which assumes that ⁵ the complainant is a mere stakeholder, the complainant cannot be heard: *Houghton v. Kendall*, 7 Allen, 72.

Bill dismissed.

THE RIGHT OF INTERPLEADER.*

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*REFERENCE TO MONOGRAPHIC NOTES.

Interpleader in equity and under the statutes: 26 Am. Dec. 695-712.
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I. Introductory.

a. General Grounds and Purposes of Interpleading.—A bill of interpleader lies when two or more persons severally claim the same thing under different titles or in separate interests from another, who, not claiming any title or interest therein himself, and not knowing to which of the claimants he ought in right to render the debt or duty claimed, or to deliver the property in his custody, is either molested by an action or actions brought against him, or fears that he may suffer injury from the conflicting claims of the parties. The bill puts the defendants to contest their respective claims, so that it may be determined to whom the plaintiff may safely render the duty in question. The proceeding presupposes the plaintiff to be a mere stakeholder for one or the other of the defendants; and, in general, the case must be one in which he may deposit the money or property in court, and be discharged from liability. He must say, in the words of Lord Cottenham, "I have a fund in my possession in which I claim no interest and to which you, the de-

pendants, set up conflicting claims; pay me my costs, and I will bring the fund into court, and you shall contest it among yourselves." It will appear from the foregoing that to maintain such a suit, it is generally necessary to allege and show that two or more persons have preferred a claim against the plaintiff; that they claim the same thing; that the plaintiff has no beneficial interest in anything claimed; and that he cannot determine without hazard to himself to which of the defendants the money or thing belongs: *Gibson v. Goldthwaite*, 7 Ala. 281, 42 Am. Dec. 592; *National Sav. Bank v. Cable*, 73 Conn. 568, 48 Atl. 428; *Tyus v. Rust*, 37 Ga. 574, 95 Am. Dec. 365; *Ryan v. Lamson*, 153 Ill. 520, 39 N. E. 979; *National Park Bank v. Lanahan*, 60 Md. 477, 514; *Cobb v. Rice*, 130 Mass. 231; *Bliss v. French*, 117 Mich. 538, 76 N. W. 73; *Monks v. Miller*, 13 Mo. App. 363; *Sullivan v. Knights of Father Mathew*, 73 Mo. App. 43; *Funk v. Avery*, 84 Mo. App. 490; *Hartford etc. Ins. Co. v. Cummings*, 50 Neb. 236, 69 N. W. 782; *Orr Water Ditch Co. v. Larcombe*, 14 Nev. 53; *Smith v. Kuhl*, 25 N. J. Eq. 38; *Aymer v. Gault*, 2 Paige, 284; *Supervisors of Saratoga v. Seabury*, 11 Abb. N. C. 461; *Bassett v. Leslie*, 123 N. Y. 396, 25 N. E. 386; *First Nat. Bank v. Beebe*, 62 Ohio St. 41, 56 N. E. 485; *Goodrich v. Williamson*, 10 Okla. 588, 63 Pac. 974; *North Pacific Lumber Co. v. Lang*, 28 Or. 246, 52 Am. St. Rep. 780, 42 Pac. 799; *Barnes v. Bamberger*, 196 Pa. St. 123, 46 Atl. 303; *Greene v. Mumford*, 4 R. I. 313, 317; *Sioux Falls Sav. Bank v. Lien*, 14 S. Dak. 410, 85 N. W. 924; *Bolin v. St. Louis etc. Ry. Co. (Tex. Civ. App.)*, 61 S. W. 444; *Mosher v. Bruhn*, 15 Wash. 333, 46 Pac. 397; *Carstens v. Gustin*, 19 Wash. 403, 53 Pac. 550; *Hechmer v. Gilligan*, 28 W. Va. 750; *Louisiana State Lottery Co. v. Clark*, 16 Fed. 20; *McWhirter v. Halsted*, 24 Fed. 828.

b. *Real Basis of the Proceeding.*—The essential incident of the equity which justifies an interpleader is, that the complainant, so far as his own acts are concerned, is under but a single liability to pay or deliver the fund or thing in dispute, and yet is called upon to pay or deliver to two or more contesting claimants: *Ireland v. Kelly*, 69 N. J. Eq. 308, 47 Atl. 51. The true basis of the remedy is the danger, or apprehension of danger, to the complainant due to the conflicting claims of the defendants; and its object is to protect him, when he stands ready to discharge his duty when the same is ascertained: *Newhall v. Kastens*, 70 Ill. 156; *Farley v. Blood*, 30 N. H. 354. But it must appear that the claims have some reasonable foundation; and that there is a reasonable doubt as to whether payment or delivery may safely be made. The mere fact of adverse claims is not sufficient: *National Bank v. Augusta Cotton Compress Co.*, 99 Ga. 286, 25 S. E. 686; *Southwark Nat. Bank v. Childs*, 57 N. Y. Supp. 789, 39 App. Div. 560; *Post v. Emmett*, 58 N. Y. Supp. 129, 40 App. Div. 477.

But apart from this, the object of an interpleading suit, said the vice-chancellor in *Crawford v. Fisher*, 1 Hare, 436, 441, "is not to

protect a party against a double liability, but against a double vexation in respect of one liability. If the circumstances of a case show that the plaintiff is liable to both claimants, that is no case for interpleader. It is of the essence of an interpleading suit that the plaintiff shall be liable to one only of the claimants; and the relief which the court affords him is against the vexation of two proceedings on a matter which may be settled in a single suit." To the same effect, see the principal case, ante, p. 590. "The reason for the jurisdiction and remedy by bill of interpleader is not so much the danger to the complainant of two recoveries for the same thing, as the vexation arising from different claimants. Indeed, theoretically, there cannot be a danger of two recoveries for the same thing. . . . The true reason for the remedy is the risk of vexation and expense from two or more suits by different parties for the recovery of the same thing": *Livingstone v. Bank of Montreal*, 50 Ill. App. 562.

It is well, however, to read in this connection the observation of the chancellor in *Hastings v. Cropper*, 3 Del. Ch. 165, 176: "An interpleader is a proceeding in equity for the relief of a party against whom there are, at law, separate and conflicting claims, whether in suit or not, for the same debt, duty, or thing, and where a recovery by one of the claimants will not, at law, protect the party against a recovery for the same debt or duty by the other claimant. It is out of the latter circumstance that the equity to relief arises. For, although there may be two conflicting claims or processes pending against the same party, yet if his being fixed, at law, for one discharges him from the other, he needs no relief in equity, and a bill of interpleader does not lie."

If the determination of the dispute between the claimants will settle the claim of each, they should be compelled to litigate with each other, the complainant having no interest further than the rightful disposition of the fund or thing in controversy. The conflicting claims may arise wholly because of the acts or omissions of the contending parties, and entirely without the fault or participation of the complainant; yet, unless he is protected by the court, he may be subjected to actions by each party, and obliged to defend several suits, though all the while ready to pay the money or deliver the property in dispute if he knows to whom he may rightfully pay or deliver it. Clearly, he has an equity under such circumstances to bring all the claimants into court, and, delivering the fund or property, to say: "I have no contention with any of you. Dismiss me, and settle your disputes among yourselves."

c. *Not a Proceeding in Rem.*—An interpleader suit is not a proceeding in rem, so that personal notice can be dispensed with: *Washington Life Ins. Co. v. Gooding*, 19 Tex. Civ. App. 490, 49 S. W. 123. Thus, if an insurance company files a bill of interpleader in one state alleging that a fund due under a policy is claimed by sev-

eral parties, and pays the money into court, a decree awarding the fund to another claimant is not binding on a nonresident administrator, who was not a party to the suit except by publication: *Expressman's Mut. Ben. Assn. v. Hurlock*, 91 Md. 585, 80 Am. St. Rep. 470, 46 Atl. 957.

d. Present Scope of the Remedy.

1. *As Affected by Statutes Generally.*—The proceedings in interpleader are strictly equitable in character: *Funk v. Avery*, 84 Mo. App. 490. From the earliest times, however, the right of interpleader in certain cases existed at law. But the old system generally has very much fallen into disuse in modern practise by the adoption of a more comprehensive, flexible, and expeditious statutory system. The remedy given by statute does not necessarily oust courts of equity of their jurisdiction to proceed by bill of interpleader, but is often regarded as merely a concurrent, cumulative, or auxiliary remedy: See the monographic note to *Shaw v. Coster*, 35 Am. Dec. 709-711; *Board of Education v. Scoville*, 13 Kan. 17; *Hartford Annuity Ins. Co. v. Cummings*, 50 Neb. 236, 69 N. W. 782; *First Nat. Bank v. Beebe*, 62 Ohio St. 41, 56 N. E. 485; *Brock v. Southern Ry. Co.*, 44 S. C. 444, 22 S. E. 601.

2. *Whether in Disfavor.*—In some of the earlier decisions it is said that bills of interpleader, on account of the delay and expense they occasion, are not encouraged, and that they will not be entertained except in cases where the complainant can in no other manner protect himself from unjust litigation in which he has no interest: See *Bedell v. Hoffman*, 2 Paige, 201; *Greene v. Mumford*, 4 R. I. 313. So far as this language may convey the idea that interpleading suits are in disfavor, it is misleading. Courts are liberal in protecting stakeholders against conflicting claims, and from vexation and embarrassment attending litigation concerning the subject matter of contention. And while the operation of strict bills of interpleader was somewhat limited and their usefulness more or less impaired under the old practise by rigid and, in some respects, artificial rules, in modern practise the scope of interpleading has generally been broadened, and the rules governing its exercise have been made more flexible and liberal. To say that courts are disposed to discourage this beneficent remedy would be far, indeed, from the truth: See *Union Trust Co. v. Stamford Trust Co.*, 72 Conn. 86, 43 Atl. 555; *Order of Golden Cross v. Merrick*, 163 Mass. 374, 40 N. E. 183; *School Dist. v. Weston*, 31 Mich. 85; *Hartford etc. Ins. Co. v. Cummings*, 50 Neb. 236, 69 N. W. 782; *Webster v. Hall*, 60 N. H. 7; *McFadden v. Swinerton*, 36 Or. 336, 59 Pac. 816, 62 Pac. 12. Nevertheless, it will be found on an examination of portions of this note that some courts persist in adhering to arbitrary and technical rules laid down in the past, which is deplorably true of every branch of the law. In compiling such decisions, however, we would not be understood as lending them our approval.

3. **Bills in the Nature of Interpleader.**—Though bills of interpleader are strictly limited to certain classes of cases, there is a bill in the nature of a bill of interpleader in which the same strictness is not required. Under such a bill the complainant may seek affirmative relief, so that the fact that he claims some substantial interest or right in the subject matter in controversy, or does not admit the whole of the defendants' claims, does not bar him of the right to such remedy: See *Curtis v. Williams*, 35 Ill. App. 518; *Dorn v. Fox*, 61 N. Y. 264; *Groves v. Sentell*, 153 U. S. 465, 14 Sup. Ct. Rep. 905; *Provident etc. Assur. Soc. v. Loeb*, 115 Fed. 357. It would conduce to the ends of justice if the distinctions between bills of interpleader and bills in the nature of bills of interpleader were done away with, and it is believed that a long step in this direction has been taken by statute in most of the commonwealths: See *Union Trust Co. v. Stamford Trust Co.*, 72 Conn. 86, 43 Atl. 555.

II. Essential Prerequisites to the Right.

a. **Time of Filing Bill.**—A bill of interpleader should be filed before judgment, for after the determination of the right by a judgment at law equity cannot, as a rule, interfere: *Moore v. Hill*, 59 Ga. 760; *Union Bank v. Kerr*, 2 Md. Ch. 460; *Dodds v. Gregory*, 61 Miss. 351; *De Zouche v. Garrison*, 140 Pa. St. 430, 21 Atl. 450; *Danaher v. Prentiss*, 22 Wis. 311. Thus, where a debtor with notice of the assignment of a claim of his debtor permits the assignee and also an attaching creditor to obtain judgments against him, a bill to require them to interplead their rights comes too late: *Haseltine v. Brickley*, 16 Gratt. (Va.) 116. And in *Yarborough v. Thompson*, 3 Smedes & M. (Miss.) 291, 41 Am. Dec. 626, two judgments having been rendered against a garnishee, one in favor of an attaching creditor and the other in favor of an assignee of the note, the note being in fact the foundation of both judgments, and the garnishee having defended in both cases, it was held that a bill of interpleader would not lie.

It has been decided, however, that it is no cause of demurrer to a bill that it is filed after judgment, no defense having been made against the recovery of the judgment, when the defense in whole or in part is equitable only. Though by thus delaying his bill the complainant subjects himself to the burden of bringing the money into court, he is not deprived of his right: *Lozier v. Van Saun*, 3 N. J. Eq. 325.

b. **Disinterestedness of Complainant.**—One of the First Essentials of the remedy of interpleader is, that the complainant must not have incurred any independent liability to either of the claimants. He must stand indifferent between them, in the position of a mere stakeholder. Nor may he claim any interest in the subject matter of dispute. If he is under a liability to one of the defendants, or claims any right in the money or thing in controversy, the bill will

not lie. His position must be one of "continuous impartiality" and disinterestedness, save that the thing in his possession be awarded to the right party: *Kyle v. Mary Lee Coal etc. Co.*, 112 Ala. 606, 20 South. 851; *Whitbeck v. Whiting*, 59 Ill. App. 520; *Long v. Barker*, 85 Ill. 431; *Castner v. Twitchell-Champlin Co.*, 91 Me. 524, 40 Atl. 558; *Kerr v. Union Bank*, 18 Md. 396; *Sprague v. Sole*, 35 Mich. 85; *Blue v. Watson*, 59 Miss. 619; *Knile v. Reddick (N. J. Eq.)*, 39 Atl. 1062; *Cromwell v. American Loan etc. Co.*, 57 Hun, 149, 11 N. Y. Supp. 144; *Wenstrom Electric Co. v. Bloomer*, 85 Hun, 389, 32 N. Y. Supp. 903; *Brackett v. Graves*, 51 N. Y. Supp. 895, 30 App. Div. 162; *De Zouche v. Garrison*, 140 Pa. St. 430, 21 Atl. 450; *French v. Robecharde*, 50 Vt. 43; *Killian v. Ebbinghaus*, 110 U. S. 568, 4 Sup. Ct. Rep. 232; *Richardson v. Belt*, 13 App. D. C. 197.

This was the old rule of chancery practise. It has been very considerably relaxed: *Union Trust Co. v. Stamford Trust Co.*, 72 Conn. 86, 43 Atl. 555. But though it be conceded that the assertion of a perfect disinterestedness is an essential of a bill of interpleader, yet "the interest in the subject matter of the suit sufficient to deny the complainant the right to bring a strict bill of interpleader must be a substantial, contested right; otherwise, no such bill, however meritorious the case, could ever be entertained": *McNamara v. Provident etc. Assur. Soc.*, 114 Fed. 910, 914. It is no objection that the complainant has an interest in respect to other property not in the suit but which might be litigated, that one party rather than the other should succeed in the interpleader proceeding, so as to increase his own prospects of success in regard to such property. Such interest may be regarded an interest in the question, but not in the particular suit: *Oppenheim v. Wolf*, 3 Sand. Ch. (N. Y.) 571. And the mere fact that a contract relation exists between the plaintiff and defendant in relation to the fund in dispute is not necessarily fatal to the right of interpleader: *Bechtel v. Sheaffer*, 117 Pa. St. 555, 11 Atl. 889.

It is held that a trustee who is entitled to commissions if the deed of trust is enforced cannot be said to be an indifferent stakeholder without any interest in the subject matter: *National Park Bank v. Lanahan*, 60 Md. 477. Nor can the complainant, if certain defendants have recovered judgments against him. After that, "it is impossible for him to occupy a position of strict neutrality between the parties": *Home Life Ins. Co. v. Caulk*, 86 Md. 385, 38 Atl. 901. The complainant cannot adjust his own claims against the matter in controversy, and ask the defendants to interplead as to the remainder. And he cannot maintain a bill when he denies his liability to either claimant as to part of the fund, although he admits his liability as to the balance: *Southwestern Tel. etc. Co. v. Benson*, 63 Ark. 283, 38 S. W. 341; *Williams v. Matthews*, 47 N. J. Eq. 196, 20 Atl. 261.

c. **Absence of Other Remedy.**—Another general rule of interpleader is, that a bill will not lie except when the complainant has no other way to protect himself from litigation in which he has no interest: *Fetterhoff v. Sheridan*, 94 Md. 445, 51 Atl. 123; *Harvey v. Raynor*, 66 N. Y. Supp. 490, 32 Misc. Rep. 639; *Carroll v. Parks*, 60 Tenn. (1 Bart.) 269; *Hinckley v. Pfister*, 83 Wis. 64, 53 N. W. 21; *Killian v. Ebbinghaus*, 110 U. S. 568, 4 Sup. Ct. Rep. 232. Still, an interpleader suit has been sustained upon other grounds than absolute necessity. The complainant may be entitled to relief, though he need not have come into equity. And clearly he cannot be driven from one remedy in equity, because he may have another equitable remedy that may be considered more convenient to pursue: See *Curtis v. Williams*, 35 Ill. App. 518, 531; *Lozier v. Van Saun*, 3 N. J. Eq. 325; *Langston v. Boylston*, 2 Ves. 109.

d. **Privity—Common Source of Title.**—It is often laid down that one of the essential requisites to equitable relief by bill of interpleader is, that the adverse titles of the respective claimants must be connected or dependent, or one derived from the other or from a common source. There must be privity of some sort between all the parties, such as privity of estate, title, or contract; and the claims should be of the same nature or class: *Kyle v. Mary Lee Coal etc. Co.*, 112 Ala. 606, 20 South. 851; *Third Nat. Bank v. Skillings Lumber Co.*, 132 Mass. 410; *Goodrich v. Williamson*, 10 Okla. 588, 63 Pac. 974; *North Pacific Lumber Co. v. Lang*, 28 Or. 246, 52 Am. St. Rep. 780, 42 Pac. 799; *Wells, Fargo & Co. v. Miner*, 25 Fed. 533.

“While the early authorities were exacting upon this subject, many of the later cases have been less rigid, and some have ignored it altogether. The doctrine seems to have been abrogated in England, partly by statute, and partly by judicial decisions. Mr. Pomeroy, referring to the rule, says that ‘it is a manifest imperfection of the equity jurisdiction that it should be so limited. A person may be and is exposed to danger, vexation, and loss from conflicting independent claims to the same thing, as well as from claims that are dependent, and there is certainly nothing in the nature of the remedy which need prevent it from being extended to both classes of demands’: *Pomeroy’s Equity Jurisprudence*, sec. 1324, note. Our statutory interpleader does not recognize the doctrine. A somewhat similar statute in England led the courts of that country to declare that they no longer felt bound, even in an equity action, by the narrow principle previously laid down: *Attenborough v. London etc. Dock Co.*, L. R. 3 C. P. D. 450. It is not necessary, however, for us to decide whether the rule still exists, or to what extent it exists in this state; because, according to the most exacting authorities, where the adverse titles of the claimants are both derived from a common source, it is sufficient to authorize an interpleader”: *Crane v. McDonald*, 118 N. Y. 648, 23 N. E. 991.

Since the adverse claims may arise from such an endless variety of causes, it is difficult to define any limitation which must deprive the holder of the fund or property of his right to be protected. And this strict rule seems so artificial that we do not hesitate to indorse the dictum of the New York court, and the opinion of the well-known writer of equity jurisprudence there quoted. In California, an action of interpleader can be maintained, and the applicant or plaintiff discharged from liability to all or any of the conflicting claimants, although their titles or claims have not a common origin, or are not identical, but are adverse and independent of one another: See *Fox v. Sutton*, 127 Cal. 515, 59 Pac. 939.

In *Boyle v. Manion* (Miss.), 21 South. 530, it is held that an interpleader will lie by one sued on an open account for timber cut from the plaintiff's land, when the proceeds of the timber are also claimed by third persons who set up paramount title to the land. The contention was made that interpleader would not lie because the claimants claimed by paramount title, and not by any privity with the debtor. But the court was of a contrary opinion.

e. Identity of Demands.—A still further general condition to the right of interpleader is, that the same debt, duty, or thing must be claimed by the contestants; that is, the subject matter of their claims must be identical: *Hayes v. Johnson*, 4 Ala. 267; *Wallace v. Sortor*, 52 Mich. 159, 17 N. W. 794; *Freda v. Montauk Co.*, 55 N. Y. Supp. 748, 26 Misc. Rep. 199; *Carroll v. Demarest*, 58 N. Y. Supp. 1028, 42 App. Div. 155; *Goodrich v. Williamson*, 10 Okla. 588, 63 Pac. 974; *Lincoln v. Rutland etc. R. R. Co.*, 24 Vt. 639; *Wells, Fargo & Co. v. Miner*, 25 Fed. 533. The purchaser of land who pays part of the price in cash, and gives his note for the balance cannot, when the mortgage note and the purchase money note are transferred to different persons, maintain a bill of interpleader against them: *Wilkinson v. Searcy*, 74 Ala. 243. And when the subject of the action, as appears from the complaint, differs from the subject of the action as disclosed by the answer and cross-complaint of the third party brought in to interplead, the case is not a proper one for interpleader: *Johnson v. Oliver*, 51 Ohio St. 6, 36 N. E. 458.

But this rule is not inflexible. The statutes of California authorize an action of interpleader, although the conflicting claims are not identical: See *Fox v. Sutton*, 127 Cal. 515, 59 Pac. 939. But apart from special statutory provisions, the general rule holds true "only where each party claims that a single, undivided sum in the hands of a custodian or stakeholder is wholly payable to him. In such a case the variance in amount would show that one party's claim was not in conflict with the other. But, in cases where claims are for unliquidated damages, each defendant might allege a different value and claim a different amount, and yet interpleader would be the proper remedy: *Pomeroy's Equity Jurisprudence*, sec. 1323; note 1.

So in cases where, a fund being in complainant's hands, the whole is claimed by one defendant, and parts by others, or where the aggregate of all the claims exceeds the full amount of the fund: *School Dist. v. Weston*, 31 Mich. 85. Additional illustrations may be found in many interpleader suits in this court, under the mechanics' lien acts, when the contract is filed, and noticing creditors and holders of equitable assignments are brought in because their claims upon the contract price conflict. In these cases the claims often vary widely in amount, and sometimes involve little other dispute than a settlement of the order of their priority; yet, if the situation be such that the contract price is not enough to pay all, and the owner may be compelled to determine the order of priority of payment, it is common practise in this state to settle the rights of all the claimants under an interpleader bill. In the following cases, there were claims for different amounts made in interpleader cases which were entertained in this court: *Trenton Schools v. Heath*, 15 N. J. Eq. 23; *Wakeman v. Kingsland*, 46 N. J. Eq. 113, 18 Atl. 680; *Lanigan v. Bradley & Currier Co.*, 50 N. J. Eq. 202, 24 Atl. 505; *Board v. Duparquet*, 50 N. J. Eq. 234, 24 Atl. 922.

"In this case under consideration, each of the defendants contracted [the contracts were made by the complainant with the defendants for the filling in of League Island] separately to work on the same employment, and each contract specified a mode of estimating their compensation, which required an ascertainment of the number of cubic yards of material which each deposited in place. Each knew that the other was to be paid. Each then contributed to the creation of a confusion in the deposit which prevented an exact ascertainment of the number of cubic yards which he had put in place. . . . The result was certain and obvious from the beginning. In the case in hand, each party in default now seeks to compel the complainant, who contributed nothing to create the confusion, to pay for such a quantity of cubic yards of material in place that the total for which payment is claimed by the two exceeds the admitted aggregate amount deposited. The complainant is thus, without fault on his part, subjected to the risk of these conflicting claims," and is entitled to a bill of interpleader: *Packard v. Stevens*, 56 N. J. Eq. 489, 46 Atl. 250.

1. Doubt and Dispute as to Claims.

1. *Controversy Between the Claimants.*--The complainant must show, as a prerequisite to maintaining an interpleading suit, that there is a bona fide dispute or controversy between the defendants as to their right to the fund or thing in his possession, and that he is in doubt as to which of them is the rightful claimant, so that he cannot safely pay or deliver to either. And the doubt must be a reasonable one; any doubt is not sufficient. Otherwise an interpleader will not lie: *Partlow v. Moore*, 184 Ill. 119, 56 N. E. 317;

Varriance v. Berrien, 42 N. J. Eq. 1, 10 Atl. 875; *Knile v. Reddick* (N. J. Eq.), 39 Atl. 1062; *Wilson v. Duncan*, 11 Abb. Pr. 3; *Bell v. Hunt*, 3 Barb. Ch. 391; *Morgan v. Fillmore*, *Sheld.* (N. Y.) 62; *Perkins v. Montgomery*, 70 N. Y. Supp. 136; *Nassau Bank v. Yandes*, 44 Hun, 55; *Koppinger v. O'Donnell*, 16 R. I. 417, 16 Atl. 714. A conflict in the decisions of the courts on the adverse claims is a conclusive answer to the contention that a bill will not lie: *Crane v. McDonald*, 118 N. Y. 648, 23 N. E. 991. But the action cannot be maintained when it appears from the complaint that one claimant is clearly entitled to the subject matter of the controversy to the exclusion of the other: *Bassett v. Leslie*, 123 N. Y. 396, 25 N. E. 386.

2. **Question as to the Amount of Claim.**—But the amount which is subject to interpleader must not be in dispute. Its determination cannot be made the subject of the suit. The amount of the fund must be ascertained with sufficient certainty to enable it to be brought into court, unless the parties can agree to fix the amount: *Glaser v. Weisberg*, 43 Mo. App. 214; *Willetts v. Finlay*, 11 How. Pr. 468. A difference between the debt claimed and the sum plaintiff is willing to pay presents an insuperable objection to the prosecution of the action; for, as to so much, it does not admit title or right of payment in either claimant: *Baltimore etc. R. R. Co. v. Arthur*, 90 N. Y. 234; *Appeal of Bridesburg Mfg. Co.*, 106 Pa. St. 275. But while one is not entitled to an order of interpleader, unless he concedes a liability to some one, and for the full amount claimed (*McHenry v. Hazard*, 45 Barb. 657; *Bernstein v. Hamilton*, 49 N. Y. Supp. 932, 26 App. Div. 206; *Hely v. Lee*, 108 Tenn. 715, 69 S. W. 273), still, where there is no denial of the claim of either defendant in the suit for interpleader, the fact that in a previous action pending, brought by one of the defendants against the plaintiff upon the same claim, his claim was denied in the answer of the plaintiff, does not bring the case within the rule that an interpleader cannot be maintained which denies the claim of a defendant: *Orient Ins. Co. v. Reed*, 81 Cal. 145, 22 Pac. 484.

g. **Legal and Equitable Demands.**—A bill of interpleader is equally proper, though the claim of one defendant is actionable at law, and the other in equity: *Gibson v. Goldthwaite*, 7 Ala. 281, 42 Am. Dec. 592; *Newhall v. Kastens*, 70 Ill. 156; *Richards v. Salter*, 6 Johns. Ch. 445. And a statute allowing a defendant in an action at law to compel claimants of the fund in suit to interplead does not exclude equitable claims: *Dixon v. National Life Ins. Co.*, 168 Mass. 48, 46 Atl. 430. Such a statute is broad enough to cover an equitable interest arising from the assignment of a certificate of membership in a mutual benefit society: *Brierly v. Equitable Aid Union*, 170 Mass. 218, 64 Am. St. Rep. 297, 48 Atl. 1090.

h. **Necessity and Effect of Pending Suits.**—A bill of interpleader may be filed, though the party holding the thing or fund has not

been actually sued, or has been sued by only one of the conflicting claimants: *Gibson v. Goldthwaite*, 7 Ala. 281, 42 Am. Dec. 592; *Newhall v. Kastens*, 70 Ill. 136; *Richards v. Salter*, 6 Johns. Ch. 445. And the fact that another suit is pending in which the complainant is defendant, and in which the right to the fund may be determined, is not fatal to proceedings in interpleader: *School Dist. v. Weston*, 81 Mich. 85.

i. Possession of the Thing in Controversy.—Since the purpose of a bill of interpleader is to ascertain to whom the complainant shall pay or deliver the money or thing in dispute, it can usually be maintained only by one in possession or control of the fund or property: *Steed v. Savage*, 115 Ga. 97, 41 S. E. 272. After paying a large part of the fund to adverse claimants, it is too late to compel them to interplead: *Hechmer v. Gilligan*, 28 W. Va. 750. Yet, under special circumstances, relief will not be denied, as where one of the defendants has induced the plaintiff under a claim of right to give up the money in question, and the other defendants are prosecuting suits against him for the same money: *Nash v. Smith*, 6 Conn. 421.

j. Deposit or Payment into Court.—When a complainant has money or property in his possession, and seeks to compel persons setting up conflicting claims thereto to interplead and have their claims determined, he should bring the fund or thing into court, or offer to do so in his bill: *Starling v. Brown*, 7 Bush, 164; *Gardiner Sav. Inst. v. Emerson*, 91 Me. 535, 40 Atl. 551; *Home Life Ins. Co. v. Caulk*, 86 Md. 385, 38 Atl. 901; *Barroll v. Foreman*, 86 Md. 675, 39 Atl. 273; *Blue v. Watson*, 59 Miss. 619. The plaintiff will be discharged only to the extent of the sum paid in: *Bellingham Bay Boom Co. v. Brisbois (Wash.)*, 46 Pac. 238. While the general rule is, that the plaintiff in his bill of interpleader must state his willingness and readiness to bring the subject matter of the dispute into court, there may be circumstances which will excuse him so far as actually bringing it in: *Sioux Falls Sav. Bank v. Lien*, 14 S. Dak. 410, 85 N. W. 924. And the actual payment or deposit into court is not a condition precedent to bringing the suit: *Fox v. Sutton*, 127 Cal. 515, 59 Pac. 939; *Look v. McCahill*, 106 Mich. 108, 63 N. W. 898; *Barnes v. Bamberger*, 196 Pa. St. 123, 46 Atl. 303.

k. Other Conditions.—An interpleading suit cannot be maintained unless the respective claims are such as to antagonize and negative each other: *Moore v. Barnheisel*, 45 Mich. 500, 8 N. W. 531. And the very nature of an interpleader seems to presuppose that the rights are matured and fixed, or at least so far settled as not to depend upon the happening of a future event which is certain to occur, but on the order in which it may occur the rights of the parties must depend: *Travelers' Ins. Co. v. Healey*, 86 Hun, 524, 33 N. Y. Supp. 911. If the claim of a third party is frivolous a bill of interpleader will not lie: *Pustet v. Flannelly*, 60 How. Pr. 67. And the

complainant must not collude with or receive an indemnity from either claimant: *Marvin v. Ellwood*, 11 Paige, 365. Moreover, he cannot have an order of interpleader when one important question to be tried is whether, by reason of his own act, he is under a liability to each of them: *National Life Ins. Co. v. Pingrey*, 141 Mass. 411, 6 N. E. 93. While the irresponsibility of the party proposed to be interpleaded to respond in costs, in the event that he fails in establishing his claim, is not controlling, yet it is a circumstance which may be considered in connection with the other facts: *Williams v. Aetna Life Ins. Co.*, 8 N. Y. St. Rep. 567; *Barritt v. Press Pub. Co.*, 25 App. Div. 141, 49 N. Y. Supp. 201.

III. Persons Entitled to the Remedy.

a. *Who May Interplead in General.*—Only the debtor or custodian of the fund can maintain a bill of interpleader; a creditor or claimant cannot. This rule rests upon the fundamental proposition that the claimant is a mere holder of the stake which is contested for by the other parties: *Hathaway v. Foy*, 40 Mo. 540; *Boyer v. Hamilton*, 21 Mo. App. 520; *Arn v. Arn*, 81 Mo. App. 133. Though the strict rule is that one claimant cannot require another claimant and the stakeholder to interplead, it is held in *Webster v. Hall*, 60 N. H. 7, that a bill may be brought by two claimants against another claimant and the county, to settle the rights of the claimants to their share of a fine for a violation of the liquor law. It appears that the claimants jointly instituted and carried on prosecutions under an agreement to share the fines in certain proportions, and that as a result of the prosecutions some ten fines were paid to the country. The court justified the interpleader as "being a reasonably necessary process for conveniently and economically ascertaining the plaintiffs' rights, and furnishing their remedy."

b. *Wrongdoers.*—One seeking the advantages of a bill of interpleader must show that he stands not only indifferent between the claimants, that he is without interest in the controversy to be waged between them, but that he is in the position of a mere innocent stakeholder or depository, and that no act on his part has caused the embarrassment of conflicting claims and the peril of double vexation. When he stands to either of the parties in the relation of a wrongdoer, or it appears that by his own act or conduct double claims have been caused, he is not innocent, he is not without interest, and the court will not intervene to relieve him from the embarrassment in which he has voluntarily involved himself: *Conley v. Alabama Gold Life Ins. Co.*, 67 Ala. 472; *Kyle v. Mary Lee Coal etc. Co.*, 112 Ala. 606, 20 South. 851; *Tyus v. Rust*, 37 Ga. 574. 95 Am. Dec. 365; *Quinn v. Green*, 38 N. C. (1 Ired. Eq.) 229, 36 Am. Dec. 46; *North Pacific Lumber Co. v. Lang*, 28 Or. 246, 52 Am. St. Rep. 780, 42 Pac. 799. Wrongdoers, in obtaining possession of funds, cannot interplead the claimants: *United States v. Victor*, 16

Abb. Pr. 153. And one who violates an injunction, and thereby places himself in a situation where he may have to defend different actions concerning the same demand, is not in a position to ask the interposition of the court to award an issue to be tried by the claimants: *Morgan v. Fillmore*, 18 Abb. Pr. 217, 1 Sheld. 62.

c. *Agents, Brokers, and Vendors.*—Generally speaking, a bill of interpleader cannot be maintained by a bailee or agent to settle the conflicting claims of the bailor or principal, and a stranger who claims the property or fund by a distinct and independent title: *Marvin v. Ellwood*, 11 Paige, 365, 376. It has been said, however, that an agent may file a bill. But where this is allowed, it is under peculiar circumstances when the agent might be liable, if he paid the debt, to the principal; as where the principal had created a lien in favor of another on funds in the hands of his agent, the agent may compel the principal and the other claimant to interplead: *Hechmer v. Gilligan*, 28 W. Va. 750, citing *Smith v. Hammond*, 9 Con. Eng. Ch. 144. An agent of a corporation can make defendants interplead, who both derive title from the corporation and claim under it as assignees: *Gibson v. Goldthwaite*, 7 Ala. 281, 42 Am. Dec. 592. "The authorities cited," say the court, "merely show that a private agent cannot question the title of his principal to money or property which he has received from or for him by bill of interpleader, where a third person sets up a claim to it. Here the complainant does not deny the right of the corporation, his principal, but merely states that two of the defendants claim as its assignees the money which he holds to its credit. The defendants do not set up a title independent and paramount to the principal, but merely derivative. They professedly deduce their title from a common source, and are in such a predicament that they may with propriety be required to interplead and adjust their conflicting claims."

It has been held that a bill of interpleader by a vendor requiring two real estate agents to interplead as to which of them is entitled to commissions for effecting the sale of a piece of land, each claiming to have made the sale, will not lie: *Sachsel v. Farrar*, 35 Ill. App. 277; *Taylor v. Satterthwaite*, 22 N. Y. Supp. 187, 2 Misc. Rep. 441, Chief Justice Daly dissenting; *McCreery v. Inge*, 63 N. Y. Supp. 158, 49 App. Div. 133. We have no doubt, however, that he would be entitled to such remedy in a proper case, and a bill is entertained in favor of a vendor against two rival brokers in *Shipman v. Scott*, 14 Daly, 233.

d. *Attorneys.*—Practically the same principles are involved when an attorney brings a bill of interpleader as when an agent does. The relation in which he stands to his client will not permit him to file a bill upon every claim made to a fund which he has collected for his client: *Marvin v. Ellwood*, 11 Paige, 365. Yet, when he has col-

lected money for his client, which is claimed by two creditors of his client, and his client disclaims any interest therein, he may compel the creditors to interplead: *Sammis v. L'Engle*, 19 Fla. 809. And in *McFadden v. Swinerton*, 36 Or. 336, 59 Pac. 816, 62 Pac. 12, an attorney having the proceeds of a claim received for collection was permitted to interplead his client and adverse claimants of the fund. And his claim for fees against the fund was held not to be such an interest therein as barred his right.

e. *Receivers*.—A receiver who has a fund in his possession realized from the sale of land, to which there are two claimants, each of whom has instituted a separate action against him, respecting the fund, and obtained an injunction to prevent him from paying it over, may bring an action in the nature of a bill of interpleader against the rival claimants, compelling them to interplead and adjust their rights between themselves: *Winfield v. Bacon*, 24 Barb. 154.

f. *Purchasers of Personalty*.—A purchaser of goods may maintain an action interpleading the vendor and another person who each claim the purchase price, when he cannot, without peril, determine to whom he should make payment: *Darden v. Burns*, 6 Ala. 362; *Baltimore etc. R. R. Co. v. Arthur*, 10 Abb. N. C. 147. But the defendants in an action for the purchase price of personal property have no right to interplead persons who claim to have title to the property adverse to the plaintiff under the statutes of Wisconsin, providing that a defendant, against whom an action is pending upon a contract, may apply for an order substituting in his place a person, not a party to the action, who makes against him a demand for the same debt: *Baxter v. Day*, 73 Wis. 27, 9 Am. St. Rep. 761, 40 N. W. 675.

g. *Tenants and Lessees*.—When a tenant discovers that there are adverse claims to the rents he should file his bill of interpleader, making all the adverse claimants parties, and offering to pay the rents into court to abide the ultimate decision as to the party entitled to them: *McDevitt v. Sullivan*, 8 Cal. 592, 597; *Hall v. Craig*, 125 Ind. 523, 25 N. E. 538; *McCoy v. Bateman*, 8 Nev. 126. However, the rule that a tenant cannot dispute his landlord's title must be kept in mind; but there may be cases in which a tenant, demanding an interpleader, does not dispute his landlord's title, but affirms it and puts himself upon the uncertainty of the person to whom the rent is to be paid: *Ketcham v. Brazil Block Coal Co.*, 88 Ind. 515. The principle that a tenant cannot question his landlord's title has no application where the rival claimants to the rents claim under the landlord as his representatives: *Glaser v. Priest*, 29 Mo. App. 1. But a lessee who has voluntarily taken an independent lease from each of two adverse claimants to the title of the same real estate, cannot compel his lessors to interplead and litigate.

their conflicting titles and the validity of their leases before either of them can receive his rent, and thereby exonerate himself from liability for the rent due on both leases: *Standley v. Roberts*, 59 Fed. 836.

h. Bailees—Warehousemen and Deposit Companies.—The general rule is laid down that a bailee cannot protect himself against his bailor and a third person who asserts an adverse title to the bailor: *First Nat. Bank v. Bininger*, 26 N. J. Eq. 345; *Bartlett v. Imperial Majesty etc.*, 23 Fed. 257. This is no hard-and-fast rule, however. A suit in the nature of an interpleader is considered a proper remedy in such cases: *Ball v. Liney*, 48 N. Y. 6, 13, 8 Am. Rep. 511; *Banfield v. Haeger*, 45 N. Y. Super. Ct. (13 Jones & S.) 428, 7 Abb. N. C. 318. And whenever the third person claims the thing under a title derived from the bailor by assignment, sale, or mortgage, subsequent to the bailment, the bailee may compel the parties to interplead, for there is no denial of the original title or right: *Bechtel v. Sheaffer*, 117 Pa. St. 555, 11 Atl. 889. The hardship of denying the remedy of interpleader to a bailee as against the bailor and a third person setting up an adverse claim is obvious. The rule seems to prevail no longer in England: See *Attenborough v. London etc. Dock Co.*, L. R. 3 C. P. D. 373. And under the modern liberality of procedure we apprehend the remedy would be available in many instances in this country. But of course the essential conditions must exist. The bailee must stand indifferent: *Lawson v. Terminal Warehouse Co.*, 70 Hun, 281, 24 N. Y. Supp. 281; *De Zouche v. Garrison*, 140 Pa. St. 430, 21 Atl. 450. And he cannot seek relief in respect to a state of affairs which has been brought about by his own misconduct: *Hatfield v. McWhorter*, 40 Ga. 269.

Where a warehouseman, as agent, sells the property of his bailor to a purchaser, who leaves it in the warehouse, he is not entitled to a bill of interpleader to prevent suits brought against him by the original bailor, who denies the agency and the purchaser, both of whom claim title to the property: *Tyus v. Rust*, 37 Ga. 574, 95 Am. Dec. 365. A safety deposit company may protect itself by bringing an action of interpleader: *Mercantile Deposit Co. v. Dimon*, 72 Hun, 638, 25 N. Y. Supp. 388; *Mercantile Deposit Co. v. Huntington*, 89 Hun, 465, 35 N. Y. Supp. 390.

i. Banks.—Where money has been deposited with a bank, and the elements of a case for interpleader are present, the bank may protect itself by interpleading the adversary claimants: *James v. Sams*, 90 Ga. 404, 17 S. E. 962; *People's Sav. Bank v. Look*, 95 Mich. 7, 54 N. W. 629; *Wayne County Sav. Bank v. Airey*, 95 Mich. 520, 55 N. W. 355; *German Exchange Bank v. Commissioners of Excise*, 6 Abb. N. C. 394; *Flanery v. Emigrant etc. Sav. Bank*, 23 Abb. N. C. 40, 7 N. Y. Supp. 2; *Pratt v. Myers*, 28 Abb. N. C. 460, 18 N. Y. Supp. 466; *Fletcher v. Troy Sav. Bank*, 14 How. Pr. 383; *Schweiger*

v. German Sav. Bank, 57 N. Y. Supp. 356, 27 Misc. Rep. 123; Dickeschied v. Bank, 28 W. Va. 340; Foss v. First Nat. Bank, 3 Fed. 185. In *City Bank of New York v. Skelton*, 2 Blatchf. 14, Fed. Cas. No. 2739, Justice Betts remarks that it is insisted that the general rule as to the right to interplead "does not apply to bailees or to bankers, but that they are bound by the general principles of law to restore to the bailor the deposit made with them. But the cases which seemingly support that objection are counterbalanced by a weightier array of authorities, both English and American, to the contrary. The rule has been directly sanctioned in the cases of funds deposited in a bank, and with a stakeholder; and it has been applied in behalf of a captain of a vessel, against whom there were adverse claims upon bills of lading. Each of these cases is strong in analogy to the present one, and I should feel no difficulty in declaring, upon the general principles of equity jurisprudence, that a bank may be entitled to relief by bill of interpleader against separate and adversary parties who claim title to moneys therein deposited." It will be noticed that some of the above cases involve savings banks, and there is no doubt that such banks may interplead rival claimants for the same fund or credit. It is held, however, that a bank is not entitled to an interpleader when it denies that the full amount demanded by one claimant is due: *Du Bois v. Union Dime Sav. Inst.*, 89 Hun, 382, 35 N. Y. Supp. 397. The rival claimants in this case demanded different amounts.

K. Common Carriers.—When goods in the custody of a common carrier are the subject of conflicting claims, and the carrier knows not to whom he may with safety make delivery, he may invoke the remedy of interpleader and compel the rival claimants to determine between themselves as to which is entitled to the property: *Shellenberg v. Fremont etc. R. R. Co.*, 45 Neb. 487, 50 Am. St. Rep. 561, 63 N. W. 859; *Schuyler v. Hargous*, 28 How. Pr. 245. Against this it may be argued that a carrier cannot be allowed to dispute the shipper's title: See *McGaw v. Adams*, 14 How. Pr. 461. But we do not regard this as a serious objection under the reformed procedure. "If there ever was a case for interpleader clearly made out," says Chief Justice McIver in *Brock v. Southern Ry. Co.*, 44 S. C. 444, 22 S. E. 601, "it seems to us this is one. The undisputed facts are that the defendant [railway] company is in possession, rightfully acquired, of certain property to which it makes no claim whatever [except a lien for freight], and, on the contrary, avers its readiness to deliver the property to the rightful owner, as to which the defendant company is in honest doubt, owing to the antagonistic claims of its codefendant and the plaintiffs, which it has no means of determining; and that defendant is not acting in collusion with either of said claimants."

L. Trustees.—A trustee may maintain a suit to compel rival claimants to interplead their rights to surplus income in his hands, and
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also their rights to the principal, though the result of the suit may be a decree directing the trustee to retain and administer the property: *Union Trust Co. v. Stamford Trust Co.*, 72 Conn. 86, 43 Atl. 555. And where there are two claimants of a trust created for the benefit of a religious society, they may be required to interplead in order to ascertain the true beneficiary: *First Presbyterian Soc. v. First Presbyterian Soc.*, 25 Ohio St. 128. But trustees cannot maintain a bill in the nature of a bill of interpleader to settle a question in which they have a direct personal interest: *Sohier v. Burr*, 127 Mass. 221. And a trustee under a deed of trust, having in his hands a surplus after foreclosure, cannot invoke the remedy of interpleader in respect to a rival claim brought into existence by his own voluntary act, as where he procures an administrator to be appointed to the end that there may be contested claims: *Swain v. Bartlett*, 82 Mo. App. 642.

m. Executors and Administrators.—When a judgment creditor of a legatee or distributee under a will brings a creditor's bill, making the debtor and the administrator with the will annexed parties, the administrator may interpose a bill of interpleader, praying that a claimant other than the plaintiff be brought in and compelled to litigate with the plaintiff as to their respective rights: *First Nat. Bank v. Beebe*, 62 Ohio St. 41, 56 N. E. 485. So, if a legatee is not described in a will with exact accuracy, the description being applicable to different persons, each of whom claims the legacy, the executor may bring a bill of interpleader to determine to whom the legacy belongs: *Morse v. Sterns*, 131 Mass. 389. An administrator who has been ordered by the probate court to pay over to the distributees of the estate cannot maintain a bill of interpleader, under ordinary circumstances, against those claiming the benefit of the order: *Freeland v. Wilson*, 18 Mo. 380. And it is held that an executor has such an interest in the testator's property as precludes him from calling upon legatees to interplead with a person who has sued the executor for the property bequeathed to the legatees, and who claims it under title paramount to the testator's: *Adams v. Dixon*, 19 Ga. 515, 65 Am. Dec. 608. When an executor is sued by a devisee for a sum to which she is entitled under the will, and is also sued by a creditor of the devisee upon a debt alleged to be due from her to him, an interpleader will not be awarded when it is not shown clearly how and upon what account the creditor can recover from the executor: *Davis v. Davis*, 96 Ga. 136, 21 S. E. 1002.

A bill in the nature of a bill of interpleader, brought by an executor to obtain instructions from the court as to the execution of his trust, cannot be employed to try the rights of creditors of the deceased after their claims are barred by the statute of limitations: *Bradford v. Forbes*, 91 Mass. 365. And it is not a proper case for interpleader where the next of kin of an intestate, and a person claiming to hold as assignee, claim the proceeds of an insurance

policy on the life of the decedent, which are in the hands of the administrator: *Stevens v. Warren*, 101 Mass. 564. By consent of the parties, however, the court took jurisdiction in this case, treating the bill as one by a trustee for instructions. Where an executor held two trunks claimed by two persons as gifts from the testatrix, and also by a residuary legatee, it was held that the executor could not file a bill of interpleader, for an action at law by one of the alleged donees would conclude both the legatee and the executor: *Fitts v. Shaw*, 22 R. I. 17, 46 Atl. 42.

IV. Property and Funds Subject to Interpleading.

a. **Money Due on Building Contracts.**—The owner of a building may compel the contractor and another person, who both claim the amount due under the building contract to interplead: *Lapenta v. Lettieri*, 72 Conn. 377, 77 Am. St. Rep. 315, 44 Atl. 730; or, if he also seeks affirmative relief, he may maintain a bill against them in the nature of a bill of interpleader: *Illingworth v. Rowe*, 52 N. J. Eq. 360, 28 Atl. 456. Of course, he must bring himself within the recognized principles upon which such bills are founded, otherwise he cannot invoke their aid: *Hellman v. Schneider*, 75 Ill. 422. A bill has been denied the owner against persons claiming liens for work done and materials furnished to the contractor, to settle their claims to the amount due the contractor, and to release the building from liability, since the holders of mechanics' liens are not concerned with the state of account between the owner and contractor, their remedy being by sale of the building: *Ammendale Normal Inst. v. Anderson*, 71 Md. 128, 17 Atl. 1030. See, too, *Drydock Methodist etc. Church v. Carr*, 2 Barb. 60.

b. **Corporate Stock and Dividends.**—A corporation which issues a certificate of stock may bring an action to compel two claimants to interplead between themselves for the purpose of determining their conflicting rights, when it is substantially a mere stakeholder: *American Press Assn. v. Brantingham*, 68 N. Y. Supp. 285, 57 App. Div. 397. See, also, *Cady v. Potter*, 55 Barb. 463. So, where persons hold stock in escrow, to be delivered in accordance with the terms of an option, and no collusion appears, they may require the parties interested to interplead and litigate their conflicting claims thereto among themselves, it appearing that the complainants have no interest in the stock further than to deliver it to the person entitled to it: *Walker v. Bamberger*, 17 Utah, 239, 54 Pac. 108. A corporation may interplead two opposing claimants to dividends due on shares of its stock: *Salisbury Mills v. Townsend*, 109 Mass. 115.

c. **Proceeds of Negotiable Instruments.**—In case the money due on a negotiable instrument is claimed by two or more persons, and the party liable thereon cannot safely make payment to either, he is entitled to bring a bill of interpleader against them that their

conflicting claims may be adjusted between themselves: *Herndon v. Higgs*, 15 Ark. 389; *McClintock v. Helberg*, 168 Ill. 384, 48 N. E. 145; *Rohrer v. Turrill*, 4 Minn. 407; *Van Buskirk v. Boy*, 8 How. Pr. 425; *Howe Mach. Co. v. Gifford*, 66 Barb. 597. Thus, where the holder of a bill of exchange is declared a bankrupt, and it is doubtful whether the bill was in the jurisdiction so as to pass to the assignee in bankruptcy, except as to bona fide holders without notice, the drawer, who is liable to pay the bill to the rightful holder and owner, may file a bill of interpleader against the different claimants: *Bell v. Hunt*, 3 Barb. Ch. 391. An interest in the money collected on a note is fatal to the complainant's right to maintain interpleader proceedings: *Wing v. Spaulding*, 64 Vt. 83, 23 Atl. 615.

d. *Insurance Money*.—The remedy of interpleader is often resorted to by insurance companies when beset by rival claims for the proceeds of contracts of insurance. There can be no doubt that such remedy is proper in cases of this kind, provided the essential conditions of an interpleader suit are present: See *Morrill v. Manhattan Life Ins. Co.*, 183 Ill. 260, 55 N. E. 656; *Brierly v. Equitable Aid Union*, 170 Mass. 218, 64 Am. St. Rep. 297, 48 N. E. 1090; *Heusner v. Mutual Life Ins. Co.*, 47 Mo. App. 336; *McCormick v. Supreme Council*, 39 N. Y. Supp. 1010, 6 App. Div. 175; *Sexton v. Home Fire Ins. Co.*, 54 N. Y. Supp. 862, 35 App. Div. 170; *Merchant v. Northwestern Life Ins. Co.*, 68 N. Y. Supp. 406, 57 App. Div. 375. There must, as in other instances where interpleading is sustainable, be a reasonable foundation for the apprehension that payment cannot be made to either claimant without hazard. The mere fact that a third person makes a claim is not sufficient, if no circumstance is shown to indicate that it has the slightest foundation: *Lennon v. Metropolitan Life Ins. Co.*, 45 N. Y. Supp. 1033, 20 Misc. Rep. 403; *Hinsdale v. Bankers' Life Ins. Co.*, 76 N. Y. Supp. 448, 72 App. Div. 180.

Moreover, the company must be a mere stakeholder, standing indifferently between the claimants. Where, at the request of the assured, it cancels his policies, and issues them anew, changing the names of the beneficiaries, it does not stand indifferent between them; the two sets of policies represent different debts and duties, and in the defeat of one of them the company has such an interest as precludes it from maintaining a suit of interpleader: *Conley v. Alabama Gold Life Ins. Co.*, 67 Ala. 472. So, if a company allows the insured to surrender his policy without the consent of the beneficiary, and issues a new policy payable to a different beneficiary, it cannot interplead the two beneficiaries on the death of the assured to determine its liability: *National Life Ins. Co. v. Pingrey*, 141 Mass. 411, 6 N. E. 93. See, also, the principal case, ante, p. 590. But a fraternal society which issues, in place of a benefit certificate that he surrenders, a certificate, promising to pay a certain sum on his

death to a different person than the one first named, may maintain a bill against both beneficiaries and the administrator of the deceased member's estate to have it determined to whom the fund shall be paid: *Order of the Golden Cross v. Merrick*, 163 Mass. 374, 40 N. E. 183. "It has not issued," said Justice Holmes, "two independent life policies to two sets of defendants, as seemed possible in *National Life Ins. Co. v. Pingrey*," 141 Mass. 411, 414, 6 N. E. 93. In *Emerick v. New York Life Ins. Co.*, 49 Md. 352, it is decided that where the insurer substitutes one policy for another, whereby the beneficiaries are changed, it may interplead the conflicting claimants, when it appears that the second policy was issued upon the representations of the assured and that the company was misled by them. A fire insurance company may interplead two rival claimants, although one of them did not bring his action within twelve months after the loss, which fact constitutes a good defense to the company: *Grell v. Globe etc. Ins. Co.*, 67 N. Y. Supp. 253, 55 App. Div. 612.

e. **Damages in Eminent Domain.**—Money assessed as damages for the taking of property for a public use may be a proper subject of interpleader: See *Kansas City etc. Ry. Co. v. View*, 156 Mo. 608, 57 S. W. 555; *Barnes v. Mayor*, 27 Hun, 236. If the money for land taken under the power of eminent domain has been paid into the county treasury, the treasurer may interplead persons claiming it, and his costs will come out of the fund: *Keller v. Bading*, 64 Ill. App. 198.

f. **Funds that have been Garnished.**—A bill of interpleader is a proper remedy for a garnishee against whom conflicting claims are made in respect to the fund in his hands in which he disclaims any title or interest: See *Webster v. McDaniel*, 2 Del. Ch. 297; *Hastings v. Cropper*, 8 Del. Ch. 165; *Moore v. Barnheisel*, 45 Mich. 500, 8 N. W. 531; *Warren v. Robbins*, 23 Miss. 309; *Groschke v. Bardheimer*, 15 Mo. App. 333; *Fitch v. Brower*, 42 N. J. Eq. 300, 11 Atl. 330; *Foy v. East Dallas Bank* (Tex. Civ. App.), 28 S. W. 137. Compare *Blair v. Hilgediek*, 45 Minn. 23, 47 N. W. 310. It is held, however, that he cannot maintain the bill if, by mistake, he has incurred liability by answering the process, admitting indebtedness to the judgment debtor: *Mitchell v. Northwestern Mfg. etc. Co.*, 26 Ill. App. 295. Where the maker of a note payable to a married woman is sued by the husband and wife, and is also garnished by creditors of the husband, he may require them to interplead: *Fahie v. Lindsay*, 8 Or. 474.

h. **Miscellaneous Funds and Subjects.**—A person who cannot safely pay a judgment may file a bill of interpleader or a bill in that nature: *Fowler v. Williams*, 20 Ark. 641; *Fowler v. Lee*, 10 Gill & J. (Md.) 358, 32 Am. Dec. 172. So may one taxed in two different towns or counties for the same property: *Mohawk etc. R. R. Co.*

v. Clute, 4 Paige, 384; Thomson v. Ebbets, 1 Hopk. Ch. (N. Y.) 272; Dorn v. Fox, 61 N. Y. 264. Compare Macy v. Nantucket, 121 Mass. 251, where it was held that a bill against the collectors was demurrable for reasons of policy in favor of the prompt collection of taxes. And a bill will lie to determine which of two towns has the right to assess taxes on certain property, the boundary line being in dispute, if no objection is taken by either defendant: Forest River Lead Co. v. Salem, 165 Mass. 193, 42 N. E. 802. Obviously, if property is taxable in both towns, the collectors cannot be interpleaded: Greene v. Mumford, 4 R. I. 313.

An auctioneer may interplead adverse claimants of deposit money received by him: Blecker v. Graham, 2 Edw. Ch. 647. And the surety on a bond may be entitled to the remedy of interpleader: Bacon v. American Surety Co., 65 N. Y. Supp. 738, 53 App. Div. 150. A city may bring an interpleader suit to determine the rights of two persons claiming to hold a municipal office to the salary: Mayor etc. New York v. Flagg, 6 Abb. Pr. 296; but not if the right to the office will be involved: Buffalo v. Mackay, 15 Hun, 204. A defendant sued by several claimants for the proceeds of a lottery drawing collected by him is entitled to a rule on them to interplead: Roselle v. Farmers' Bank, 119 Mo. 84, 24 S. W. 744. A court of admiralty may grant relief by bill of interpleader: Copp v. De Castro etc. Co., 8 Ben. 321, Fed. Cas. No. 3215.

KOLB v. UNION RAILROAD COMPANY.

[23 R. I. 72, 49 Atl. 392.]

IMPEACHING BY EVIDENCE of Specific Acts of Misconduct and of General Reputation.—Specific acts of misconduct committed by a witness who is a party to a suit may be shown where the act has some relation to, or some bearing upon, an issue involved in the case, and his general reputation as to the particular trait of character involved may also be shown. (p. 616.)

WITNESS—Impeaching by Showing Want of Chastity.—In an action by an administratrix of a decedent as his widow and also for the benefit of his minor children to recover for his death caused by the defendant's negligence, it is error to require her to answer whether she had borne an illegitimate child since his death. Such evidence is not admissible for the purpose of impeaching her, and for any other purpose it is immaterial. (p. 617.)

WITNESS—Cross-examination for the Purpose of Degrading.—The court ought not, on cross-examination of a witness, permit his past life to be ransacked and his misdeeds brought before the jury for the purpose of disgracing or degrading him in their eyes. (p. 619.)

John W. Hogan and George R. Macleod, for the plaintiff.

David S. Baker, for the defendant.

⁷² TILLINGHAST, J. One of the grounds relied on by the plaintiff in her petition for a new trial in this case is that the justice presiding at the jury trial thereof erred in the admission of certain testimony. The action was brought by the plaintiff, who is the widow of Gottlieb Kolb, for the benefit of herself and her three minor children by said Gottlieb living at the time of his decease, and all of whom were living when this action was begun, which was nearly two years after his decease.

The declaration alleges that the action was brought for the benefit of the plaintiff administratrix, as widow of the deceased, and also for the benefit of John Kolb, George Kolb, and Julia Kolb, all surviving minor children of said Gottlieb Kolb, deceased, living at the time of his decease and now still surviving.

⁷³ At the trial of the case the plaintiff was called as a witness, for the purpose, amongst other things, of proving her marriage, her qualification as administratrix, and who, as beneficiaries in this action, under the statute, were entitled to the damages, if any, which should be recovered for the death of her husband.

Upon her examination in chief she was asked about the members of her family at the date of her husband's death, January 3, 1894, and also at the date of the commencement of this action, December 30, 1895, which was nearly two years after his decease. The questions asked, in so far as they are pertinent to the present inquiry, were these:

"Q. At the time of your husband's death and at the time you began this suit, how many children had you by Gottlieb Kolb? A. Three children.

"Q. That are living? A. Yes, sir.

"Q. How many children did you have by Gottlieb Kolb? A. Three."

Then follows testimony giving the names of these children as set forth in the declaration, and the age of each. "Q. Did you ever have any other children by Gottlieb Kolb? A. No, sir." In cross-examination counsel for defendant was permitted, against the objection of the plaintiff and after some discussion as to the evident purpose of the inquiry, to ask the following question: "Q. You have more than three, haven't

you?" The court ruled that it would be proper for the defendant to show what children the deceased left, and, as affecting the plaintiff's character for truth and veracity, to show that there had been improper conduct on her part since her husband's death.

The ground of objection on the part of plaintiff was that the evidence was immaterial and irrelevant, and was specially obnoxious to the objection that it was an attempt to impeach the plaintiff's character for chastity without first showing a conviction of the offense involved in her misconduct. Notwithstanding the plaintiff's objection, however, she was compelled to admit that she gave birth to an illegitimate child October 20, 1895, more than twenty-one months after her husband's death. The admission of this evidence was duly excepted to by the plaintiff, and the question presented, therefore, ⁷⁴ is whether the court erred in admitting it. We think this question must be answered in the affirmative. Whether or not the plaintiff had given birth to a bastard child was entirely irrelevant to any issue involved in the case on trial. Nor do we understand it to be seriously contended by defendant that it was. But it is vigorously contended that it was competent for the defendant to prove the unchastity of the plaintiff, for the purpose of affecting her credibility as a witness in the case.

The broad claim advanced by counsel for defendant, in support of the ruling complained of, is that a witness may be interrogated upon cross-examination in regard to any vicious or criminal act of his life, and may be compelled to answer unless he claims his constitutional privilege. We think this position is clearly untenable; and that, while it finds support in some of the cases relied on by the defendant, the contrary view is overwhelmingly sustained by the authorities.

We agree that specific acts of misconduct committed by a party to the suit may be shown in that class of cases where the act has some relation to, or some bearing upon, the issue involved in the case, and also that the general reputation of the party as to the particular trait of character involved may also be shown. Thus, in *Mitchell v. Work*, 13 R. I. 645. which was an action to recover damages laid at five thousand dollars for an indecent assault, it was held that testimony showing the plaintiff to have been unchaste in her relations with men, and also testimony that her reputation for chastity was bad, was properly admitted. The plaintiff in that case was suing for

something more than compensation for bodily injuries. Indeed, the gravamen of the assault consisted, according to her testimony, in the insult, the personal indignity, and in the mental suffering and sense of shame and wrong consequent upon it. It was therefore clearly pertinent for the defendant to show that she was a vulgar, licentious, and unchaste woman, and hence that the damages to which she would be entitled, if any, would be much less than if she had been upright and chaste in her character. But no such question is presented in the case at bar. Here the plaintiff is suing for damages sustained ⁷⁵ by the death of her husband through the alleged negligence of the defendant. And the fact that she has given birth to an illegitimate child since the death of her husband in no way whatever affects the question of damages involved in the case; nor, indeed, does it affect any other question involved therein. Nor can said fact be properly shown for the purpose of affecting the plaintiff's credibility for truth and veracity. The credit of a witness can be directly impeached only by showing that his general reputation for truth and veracity is bad. "Certainly it is a fixed and established rule of evidence," as said by the court in *Holbrook v. Dow*, 12 Gray, 358, "that it is not competent, for the purpose of creating a distrust of his integrity and of thus disparaging his testimony, to prove particular acts of alleged misbehavior and dishonesty in relation to matters foreign to all the questions which are involved in the trial. 'This point,' says Mr. Greenleaf, 'has heretofore been much the subject of discussion, but it must now be considered as settled and at rest.'"

In the latest edition of Greenleaf on Evidence, volume 1, section 461a, the rule as laid down by the present editor, relating to the impeachment of a witness, is stated as follows: "The fundamental trait desirable in a witness is the disposition to tell truth and hence the trait of character that should naturally be shown, in impeaching him, is his bad character for veracity. But there has always been more or less support for the use of bad general character—i. e., the man as a whole, not specifically the trait of veracity—as necessarily involving an impairment of veracity. This was the original English doctrine, but it was replaced in the early 1800's by the first-mentioned principle, with the exception that the witness was allowed to base his statement as to the other's veracity upon his knowledge of the other's general character. In this country, the better doc-

trine that the trait of veracity only could be considered was early introduced; and this is the rule in the great majority of jurisdictions."

In volume 29 of *American and English Encyclopedia of Law*, pages 804-806, the rule as to the admissibility of particular acts of misconduct, and ⁷⁶ also as to particular traits of character, is well stated in the following language: "Whether the inquiry into the character of the witness be confined to his reputation for truth and veracity, or extend to his general moral character, the rule is uniform that evidence of specific crimes or of particular acts of misconduct on his part is not admissible for the purpose of impeaching his credit. The impeaching evidence must be confined to the general reputation of the witness. It is also a general rule that peculiar traits of character, aside from that of habitual lying, shall not be made the subject of inquiry for the purpose of impeaching a witness. Thus, a witness may not be impeached by evidence that he is in the habit of associating with lewd and unchaste women; neither is it permissible, as a rule, to impeach a female witness by attacking her reputation for chastity even where it is proposed to prove that she is a common prostitute." The author adds, however, that "in a few cases the wholesome restraints of this rule have been disregarded." The cases cited which are to this effect are from Missouri, Georgia, and Kentucky.

The general doctrine above announced is sustained by Wharton on the Law of Evidence, third edition, section 541, Rapalje on the Law of Witnesses, section 197; Thompson on Trials, sections 524, 525, and is also in accord with the great majority of decisions throughout the country.

As specially pertinent to the particular question here involved, we cite the cases of *Commonwealth v. Churchill*, 11 Met. 538, 45 Am. Dec. 229; *State v. Smith*, 7 Vt. 141; *Spears v. Forrest*, 15 Vt. 437; *Gilchrist v. McKee*, 4 Watts, 380, 28 Am. Dec. 721; *State v. Carson*, 66 Me. 116; *Rudsdill v. Slingerland*, 18 Minn. 380; *Atwood v. Impson*, 20 N. J. Eq. 157; *Bucklin v. State*, 20 Ohio, 18; *Muetze v. Tuteur*, 77 Wis. 243, 20 Am. St. Rep. 115, 46 N. W. 123; *Dimick v. Downs*, 82 Ill. 570; *Moore v. Moore*, 73 Tex. 382, 11 S. W. 396.

That a trial court may properly exercise a large discretion in permitting matters which are not strictly relevant to the issue involved in the trial to be brought out in the cross-examination of witnesses, there can be no doubt. It is through cross-

examination that the whole truth is generally brought out, and that the motives of the witness in testifying ⁷⁷ are made apparent. The power of cross-examination has been justly said to be one of the principal, as it certainly is one of the most efficacious, tests which the law has devised for the discovery of truth: 1 Greenleaf on Evidence, 15th ed., sec. 446. If the witness is biased or prejudiced in favor of the party calling him, that may be made to appear in cross-examination. If he has previously made statements contrary to those made upon the witness-stand, this fact may be brought out in the same way. His relation to the case, if any, his interest in the result, his relationship to the parties or to either of them, how he came to be a witness, his intelligence, means of knowledge, his business, place of residence, the accuracy of his memory, and many other things which need not be enumerated may be thus brought out for the purpose of enabling the jury to rightly estimate and weigh his testimony. But that the past life of a witness may be ransacked and his misdeeds paraded before the jury for the purpose of disgracing and degrading him in their eyes is so obnoxious to our sense of what is justly due to a person on the witness-stand, that we cannot consent thereto. If unrestricted liberty were allowed in this respect, no witness, however modest or however venerable, could be sworn without being required, if it should please the opposing counsel, to submit to an investigation into his or her past history, however offensive and humiliating this might be, and notwithstanding the fact that the particular acts of misconduct which might thus be brought out were long ago atoned for and generally forgotten. Such inquisitions the great majority of the courts refuse to permit, and, we think, rightly so refuse.

The previous rulings of this court, so far as we are aware, have always been in harmony with the position which we have thus taken.

An examination of the numerous cases cited in the well-prepared briefs of the respective counsel in this case conclusively shows that the authorities are hopelessly divided on the question at issue, and hence it would serve no useful purpose to further discuss their relative merits. We therefore content ourselves by adopting that view which most strongly ⁷⁸ commends itself to our judgment, and which, as already said, is supported by the great preponderance of authority.

As the admission of the irrelevant and improper testimony

referred to was of such a character as to be very likely to prejudice the jury against the plaintiff—indeed, in view of the record in the case, it is not too much to say that it probably had this effect—and as it is not clear from the evidence that the defendant was entitled to a verdict in any event, a new trial must be granted: *Graham v. Coupe*, 9 R. I. 478; *King v. Colvin*, 11 R. I. 582; *Tourgee v. Rose*, 19 R. I. 432, 27 Atl. 9. We express no opinion as to the merits of the petition in so far as it is based on the ground that the verdict is against the evidence.

Petition for new trial granted, and case remitted to the common pleas division.

Impeaching Witnesses by proof of their moral character is considered at length in the note to *Lodge v. State*, 82 Am. St. Rep. 26-34. Want of chastity in a witness cannot be inquired into for the purpose of impeachment, except in cases of rape and the like. There is authority, however, to the contrary: See the monographic note to *State v. Sibley*, 53 Am. St. Rep. 479-482.

PEPIN v. SOCIETE ST. JEAN BAPTISTE.

[23 R. I. 81, 49 Atl. 387.]

ARBITRATION—Agreements for, When Void.—An agreement to submit to arbitration a controversy which has not yet arisen is void. (p. 624.)

BENEFICIAL ASSOCIATIONS—By-laws Requiring Claims for Benefits to be Submitted to Arbitration of a Committee of the Association.—A by-law of a beneficial association requiring every contestation between it and its members to be referred to, and decided by, a committee of five persons, two to be appointed by it, two by the member, and a fifth by the other four, and that the decision of such committee is final, cannot prevent the member from maintaining an action for benefits which he claims to be due him, without first submitting his claim to such committee. (p. 623.)

Arthur M. Allen, for the plaintiff.

Archambault & Gaulin, for the defendant.

⁸¹ **STINESS**, C. J. The plaintiff sues in *assumpsit* to recover for benefits which he alleges are due to him under the by-laws of the society, to which he also alleges that he has in all things conformed, that he has exhausted all the remedies within

the society, and that the society has refused to pay the same. The defendant pleads specially that a by-law of the society requires every contestation between a society and a member to be referred to and be decided by a committee of five persons, two appointed by the society, two by the member, and the fifth by the other four, and that the decision of the committee is final; that the defendant was always ready and willing to submit said claim of the plaintiff to such committee, but the plaintiff failed to accept said offer, and refused to submit his said claim to the arbitration of such committee. The plaintiff demurs to the plea.

The question raised is whether the by-law set up in the plea is a bar to the present action.

By-laws of a society are intended for the internal government ⁸² of its affairs. When they are confined within this scope, courts have no jurisdiction or control over their administration. For example, courts cannot undertake to correct matters which only relate to discipline or procedure in such bodies. By-laws are, however, in the nature of a mutual contract, and to that extent the action of a society under them may be reviewed by a court to preserve personal rights which involve something more than the mere formal action of the society—such as insurance, rights of property, or an illegal exercise of power.

The by-law in this case raises the question whether the provision to submit to an arbitration which shall be final is binding on the plaintiff as a member of the society. It is a question involving a pecuniary interest which is termed by most cases a property right.

Upon this question there have been two lines of decision. On one side are those cases which hold that a person who becomes a member of a society thereby agrees to its by-laws so as to be bound by them to the extent of having assented to a tribunal whose decision is to be final and hence not reviewable by a civil court; that such an agreement is not contrary to public policy, because by it such person has waived nothing which he had not the right and power to waive; and that such tribunal is constituted for the express purpose of settling the difference between members and the society without recourse to legal proceedings. Of this class of cases the following are examples: *Hembeau v. Great Camp Knights of Maccabees*, 101 Mich. 161, 45 Am. St. Rep. 400, 59 N. W. 417; *Canfield v. Great Camp*

Knights of Maccabees, 87 Mich. 626, 24 Am. St. Rep. 186, 49 N. W. 875; *Osceola Tribe v. Schmidt*, 57 Md. 98.

On the other side, it is held that where there is a contract to pay money, either by way of benefits or insurance, it is in the nature of a property right, which, like all other contracts, is within the jurisdiction of courts of law. We think that the stronger reason is with this class of cases. By this we do not mean that a member is free to come to the courts regardless of the by-laws of his society, but only that he is not in all respects absolutely bound by them. Where, as we have said, the by-laws relate simply to matters of internal ^{ss} administration, or of discipline, courts will not undertake to review them. Courts are not established for such a purpose. Also, where the by-laws amount to a condition precedent to a right of action, such as a proper opportunity to hear and examine a claim for the purpose of ascertaining the liability or the amount due, they must be followed before a court will hear a party who has failed thus to conform to his reasonable contract. This is a principle applicable to all contracts. A familiar illustration is found, in contracts of insurance, in provisions relating to notice, adjustment of loss, and the like. Also in statutory provisions requiring those who have claims against a city or town to present them for a certain time, in order to allow opportunity for investigation. But where a person who has a right of action is deprived of his remedy, either by nonaction or wrong action on the part of the society, or where by-laws impose conditions which would not be allowed to stand, under recognized rules of law, in other cases of contracts, such by-laws are invalid, upon the ground that they operate to deprive a person of his remedy of recourse to the law, which is a common constitutional right.

Among the conditions thus imposed, the one upon which this case arises has often been considered by courts, and that is in regard to a by-law which makes a finding by a committee or by arbitrators, not simply a condition precedent to recovery, but a final and conclusive adjudication between the parties, and so a bar to an action.

The by-law in question involves two conditions: One to submit future disputes to arbitration, and another to make the decision final. Both conditions are objectionable as a bar to a suit. The general rule as to arbitrations, outside of covenants in a deed, is that a party may at any time, before award made, revoke the authority of the arbitrators: *Sherman v. Cobb*, 15 R.

I. 570, 10 Atl. 591. It would be idle to compel a party to enter into an arbitration which he can forthwith revoke, and which, in order to preserve his rights, he must revoke before an award is made: *Reed v. Washington Ins. Co.*, 138 Mass. 572. Hence the agreement to submit such disputes as may arise in the future have no binding force, ⁸⁴ except in cases where it amounts only to a condition precedent to recovery. The finality of such an agreement is objectionable for several reasons. The reason generally given is that it ousts courts of jurisdiction, and so deprives a party of his rights under the law. While he may waive those rights in a given case, when he knows the circumstances and the effect of his act, it is held to be contrary to public policy for one to bar himself in advance from a resort to the courts for some future controversy of which he can have no knowledge at the time of the original agreement. At first sight this may seem to interfere with the obligation of a contract, but it is not so. All the elements of the contract affecting liability remain, the agreement to arbitrate relating only to remedy. It is to be presumed that a just decision will be reached in either case, and hence neither party suffers injury. A resort to the courts may be very necessary to a claimant because he cannot compel the attendance of witnesses before a voluntary tribunal; or the matter may be of so great interest to the members as to preclude impartial arbitrators. The society, on the other hand, may at any time, if it does not wish to arbitrate, compel a claimant to resort to the courts by refusing to arbitrate or to pay; hence the obligation is not mutual, except in theory.

The right of a party to resort to a court, notwithstanding an agreement to arbitrate, is sustained by the following cases: *Bauer v. Samson*, 102 Ind. 262, 1 N. E. 571; *Kinney v. Baltimore*, 35 W. Va. 385, 14 S. E. 8; *Supreme Council v. Forsinger*, 125 Ind. 52, 21 Am. St. Rep. 196, 25 N. E. 129; *Daniher v. Grand Lodge*, 10 Utah, 110, 37 Pac. 245; *Wood v. Humphrey*, 114 Mass. 185; *Austin v. Searing*, 16 N. Y. 112, 69 Am. Dec. 665.

Cases involving similar questions have arisen from provisions in policies of insurance. In *Nute v. Hamilton Mut. Ins. Co.*, 6 Gray, 174, a by-law required that an action at law should be brought in a particular county, and the policy was subject to the by-laws. *Shaw, C. J.*, said that the remedy does not depend on contract, but on law; and a plea that the suit was not brought in the county named in the by-law was held not to be

a defense to the action. *Insurance Co. v. Morse*, 20 Wall. 445, raised the question whether a statute, requiring ⁸⁵ every foreign company doing business in the state to enter into an agreement that the company would not remove a suit for trial in the federal courts, was valid. It was held that such a statute was unconstitutional and the agreement void. If by-laws, contracts, and statutes abridging a right of resort to courts of law are invalid when they are agreed to in express terms, for a stronger reason should they be held to be invalid when they are agreed to only by implication and relate to controversies which have not arisen and cannot be foreseen.

We therefore decide that the plaintiff's demurrer to the defendant's plea is sustained.

A Member of a Benefit Society cannot bind himself by contract, in advance, to abide by the decisions of the tribunals of the organization and renounce his right to appeal to the courts for the redress of wrongs committed by such tribunals: Myers v. Jenkins, 63 Ohio St. 101, 81 Am. St. Rep. 613, 57 N. E. 1089. A provision in the by-laws that the decision of the officers of the association on a member's claim for benefits shall be final and conclusive is ineffectual: *Supreme Council v. Forsinger*, 125 Ind. 52, 21 Am. St. Rep. 196, 25 N. E. 129. See, further, on this subject the monographic notes to *Robinson v. Templar Lodge*, 59 Am. St. Rep. 198-209; *Kearns v. Howley*, 68 Am. St. Rep. 856-871.

PAULTON v. KEITH.

[23 R. I. 164, 49 Atl. 635.]

EVIDENCE.—The Declarations of One Assuming to Act as an Agent are not admissible to prove his agency. (p. 625.)

PRINCIPAL AND AGENT—Manager and Proprietor of Theater.—A manager of a theater who stands against the door of a stage and refuses to allow an officer to enter for the purpose of serving a writ upon an actor is not acting within the limits of the apparent scope and implied authority of his employment. (p. 628.)

AN OFFICER in the Service of Civil Process has the Right to Break Doors and command sufficient force to enter a theater or other building not occupied as a dwelling. (p. 628.)

Action of trespass on the case. Verdict for the defendant and the plaintiff petitioned for a new trial.

James A. Williams, for the plaintiffs.

Edwards & Angell, for the defendant.

¹⁰⁴ STINESS, C. J. The plaintiffs brought this suit against the defendant, the proprietor of a theater in Providence, to recover damages upon the charge that the defendant's manager prevented an officer from serving a writ in their behalf upon an actor engaged in said theater.

The evidence showed that the officer, with another officer and the plaintiffs' attorney, entered the outside door of the rear part of the theater, where they were met by the manager, with two other men, who stood against the door to the stage and refused to allow the officers to enter it. The employment of the manager by this defendant was admitted, but ¹⁰⁵ no authority from him to refuse admission to the officer was shown, other than the officer's testimony that the manager said that he was acting under the direction of the defendant. This testimony was objected to; but after the plaintiffs' case was in, the court directed a verdict for the defendant, and the plaintiffs ask for a new trial on the ground of error in such direction.

It is a general rule that the declarations of a person assuming to act as the agent of another are not admissible to prove his agency. He may be called as a witness to state what orders he has received, and upon that point he would be subject to cross-examination, from which a limitation of his authority might appear. But to allow his statement to others upon a vital point as to which he cannot be cross-examined is, obviously, hearsay testimony, and contrary to the well-settled rules of evidence.

The plaintiffs do not controvert this rule, but they claim to be within this qualification of it; that when the agent is acting within the scope of his authority and during the continuance of the agency, his declarations may be given, as to matters then occurring, as a part of the *res gestae*.

The question presented in this case, therefore, is whether the manager, in refusing entrance to the officer, was acting within the apparent scope and implied authority of his employment.

The plaintiffs argue that the defendant is liable by analogy to cases such as these: If the manager had assaulted a patron of the theater and wrongfully ejected him; if a conductor of a street-car or steam train should assault a passenger and put him off without right to do so; if a motorman should run his car at an unlawful speed and injure a passenger or a traveler upon the street—the master would be liable. Doubtless this is so, but upon very different principles from any which are applicable to this case. In the cases supposed, a proprietor of a

theater and a company running cars are held to guarantee some protection to their patrons, and to assume a liability if employes, either willfully or negligently, injure them; and a motorman, engaged in his proper duties of running ¹⁰⁶ a car, carries with him, like the driver of a horse, the master's responsibility that it shall not be driven wrongfully upon another. As to a master's responsibility to others for a willful act by his servant, there has been some conflict in decisions. In many cases it has been held that a master is responsible for the torts of his servant, done with a view to the furtherance of the master's business, whether the same be done negligently, wantonly, or even willfully, but within the scope of his employment (14 Am. & Eng. Ency. of Law, 1st ed., 817, note 3); but we need not examine those cases, because the controlling question before us is that of the agent's authority.

In *Staples v. Schmid*, 18 R. I. 224, 26 Atl. 193, this subject was carefully considered, and one of the principles recognized in determining liability was that it cannot be inferred as matter of law that a master has authorized his servant to do an act which he could not lawfully do himself in the circumstances supposed by the servant to exist. In that case the proprietor of a store was held to be liable to a customer whose arrest the defendant's salesman and custodian had caused on a wrongful suspicion of stealing goods from the store. The court said that the master would have no right to arrest and search an innocent person, but that he had the right to detain a thief and to recapture his property from him. Hence the act of the servant might be lawful or unlawful, according to the facts. As the master's substitute he had to make a decision of his duty, which, as to third persons, was the master's act, for which he was answerable either for excess of force or mistake in regard to the occasion for it. In the present case it could not be lawful for the defendant to obstruct an officer in the discharge of his duty, in any event, if the refusal of admission amounted to obstruction, and so it could not be lawful for his servant to do so.

The cases relied on by the plaintiffs, so far as they support them, are based upon lawful authority to a servant to do the act from which the injury arose and upon an excess of force or bad judgment in doing it. This is clearly right. If one employs another to do a certain thing as his servant, retaining ¹⁰⁷ the right of control, oversight, and discretion in the performance of the act—the servant acting in place of the master

and not independently—the master is responsible for the way in which the thing is done. But it is a very different thing to hold a master responsible for an act which he has never authorized a servant to do, simply because the latter is his servant, and on the strength of it to allow the statements of the servant to be put in to bind the principal.

The plaintiffs' claim goes to this extent, but the cases cited do not. In *Rounds v. Delaware R. R. Co.*, 64 N. Y. 129, 21 Am. Rep. 597, the action was for kicking a boy off a baggage-car by a brakeman. It was conceded that the removal of the plaintiff, who was a trespasser, was within the scope of the brakeman's authority, and hence the company was held to be liable for the injury caused by exercising that authority improperly by kicking the boy off against a wood-pile, from which he fell back under the cars.

Hoffman v. New York Cent. R. R. Co., 87 N. Y. 25, 41 Am. Rep. 337, was to the same effect, the court saying: "The authority to remove the plaintiff from the car was vested in the defendant's servants. The wrong consisted in the time and mode of exercising it. For this the defendant is responsible, unless the brakeman used his authority as a mere cover for accomplishing an independent and wrongful purpose of his own."

In *Adams v. Hannibal etc. R. R. Co.*, 74 Mo. 553, 41 Am. Rep. 333, the question was whether the statements of the fireman and engineer of a railway train were admissible in evidence in an action against a railroad company for negligence, and the court held that they were not.

Hynes v. Jungren, 8 Kan. 391, was a suit for false imprisonment in which the plaintiff in the original case, together with the constable serving the writ, carried the defendant in the original writ to the county jail, and kept him there for a part of a day before taking him before the justice as required by the precept. In that case the principal was an active participant in the wrong.

In *Cantrell v. Colwell*, 40 Tenn. (3 Head) 471, Mrs. Cantrell requested a relative to turn Colwell's mare out of her ¹⁶⁸ inclosure. In doing so he threw a rock at the mare and broke its leg. The court held that a request to turn out the mare could not be tortured to imply a request to injure or destroy it.

In the case at bar, there being no inference of authority as a matter of law from the defendant to his servant to do the act

here complained of, and no evidence of express authority, the statements of the servant were inadmissible, and, there being no other evidence of authority, the direction of a verdict for the defendant was right.

The verdict was also rightly directed upon another ground.

The building in which the affair took place was not a dwelling-house, and the officer had entered the outer door. If he had a valid precept, he had the right to break doors and command sufficient force to enter, having requested admittance, which had been refused: *Clark v. Wilson*, 14 R. I. 11. The cause of the plaintiffs' injury, if any, was not the refusal of the defendant's servant to allow the officer to enter, but the failure of the officer to serve his process as he might and should have done.

To this may be added the fact that the plaintiffs offered no proof of the judgment set out in their declaration, nor any evidence to show that they had suffered any pecuniary loss in the case. On the contrary, the defendant put in a discharge in bankruptcy of Seabrooke, the defendant in the original writ, subsequent to the plaintiffs' judgment, to show that the plaintiffs had no right of action against him, and consequently had suffered no damage.

The petition for a new trial is denied, and case remitted with direction to enter judgment for the defendant.

The Relation of Principal and Agent cannot be established by the declarations of the alleged agent: *Lawall v. Groman*, 180 Pa. St. 532, 37 Atl. 98, 57 Am. St. Rep. 662, and cases cited in the cross-reference note thereto. The liability of a principal for the unauthorized acts of his agent is considered in the monographic note to *Franklin Fire Ins. Co. v. Bradford*, 88 Am. St. Rep. 779-799.

An Officer is not Justified in Breaking open an outer door or window of a dwelling to serve or execute civil process: See *State v. Beckner*, 132 Ind. 371, 32 Am. St. Rep. 257, 31 N. E. 950; note to *Keith v. Johnson*, 25 Am. Dec. 171, 172.

GORMAN v. BUDLONG.

[23 R. L. 169, 49 Atl. 704.]

CHILD NOT YET BORN—Action for Injuries to.—For injuries received by a child while in its mother's womb it cannot maintain a civil action. Therefore, under a statute declaring that whenever the death of a person is caused by the neglect or default of another, and the neglect or default is such that if death had not ensued it would have entitled the party injured to maintain an action to recover damages, then the wrongdoer shall be liable to action notwithstanding such death, the proceeds of the action to go to certain kindred specified in the statute, an action cannot be maintained by the next of kin of an infant for negligently causing its death while in its mother's womb. (p. 636.)

Action of trespass on the case for negligence. To the plaintiff's declaration the defendant interposed a demurrer, which was sustained.

Leonard W. Horton, for the plaintiff.

Frederick A. Jones, for the defendant.

¹⁶⁹ ROGERS, J. The case is before us upon demurrer to the plaintiff's declaration. It is an action of trespass on the case for negligence brought by the plaintiff as father and next of kin of Patrick Gorman, Junior, and the facts as alleged are that the plaintiff was a tenant from week to week of a tenement of the defendant; that the plaster of the ceiling of the kitchen in said tenement became loose and liable to fall; that on or about November 15, 1900, and again on or about December 1, 1900, the plaintiff notified the defendant, his agents and servants, of the defective and dangerous condition of said ceiling; that in consideration that said plaintiff and the members of his family would continue in said tenement as his tenants, and in consideration that said plaintiff would and did continue to pay, or become liable to pay, the weekly rent for the same, as he had previously been accustomed to do, said defendant, his agents and servants, promised to have said tenement repaired, and said ceiling replastered, so as to make the same safe for said plaintiff and the members of his family to live in, and not subject him, them or any of them, to great danger of serious injury; whereupon it became and was the duty of said defendant to make, or cause to be made, the repairs necessary to make said tenement safe for said plaintiff and the members of his

family to live in, and not subject him, them or any of them to great danger of serious injury, and to put ¹⁷⁰ said tenement in a tenantable condition, yet said defendant, in violation of his said duty, wholly neglected to make said necessary repairs, and that thereafterward, on, to wit, January 22, 1901, in consequence of said defendant's neglecting to make said necessary repairs, said ceiling fell upon Eliza Gorman, the plaintiff's wife, while she was engaged in her household duties and in the exercise of due and reasonable care and caution on her part, severely injuring and bruising her, and that from and on account of the injuries and shock occasioned by said ceiling falling upon her, the said Eliza Gorman was caused to give birth to a child prematurely, which said child afterward, on, to wit, January 25, 1901, on account of said premature birth, died; that on account of said premature birth of said child and the weakness and illness resulting therefrom said plaintiff was obliged to and did pay, lay out and expend large sums of money, to wit, the sum of ——— dollars, for medical attendance and nursing and medicines in the proper care and treatment of said child; that on account of said death of said child occasioned as aforesaid, said plaintiff was obliged to and did pay, lay out and expend large sums of money, to wit, the sum of ——— dollars, in the burial of said child and other necessary funeral expenses; to the plaintiff's damage five thousand dollars, etc.

The action was brought to recover for the death of the child under General Laws of Rhode Island, caption 233, section 14, which is as follows, viz.:

"Sec. 14. Whenever the death of a person shall be caused by the wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony. Every such action shall be brought by and in the name of the executor or administrator of such deceased person, whether appointed ¹⁷¹ or qualified within or without the state, and the amount recovered in every such action shall one-half thereof go to the husband or widow, and one-half thereof to the children of the deceased, and if there be no chil-

dren, the whole shall go to the husband or widow, and if there be no husband or widow, to the next of kin, in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; provided, that every such action shall be commenced within two years after the death of such person. If there is no executor or administrator, or if, there being one, no action is brought in his name within six months after the death, one action may be brought in the names of all the beneficiaries, either by all, or by part, stating that they sue for the benefit of all, and stating their respective relations to the deceased; provided, that if all do not bring such suit, only those bringing it shall be responsible for costs; but judgment shall be for the benefit of all, and shall be entered as several judgments for each in his proportion as aforesaid, and executions thereon shall issue in favor of each respectively; provided, further, that if such action shall be brought by the beneficiaries, no action shall thereafter be brought by the executor or administrator. There shall be but one bill of costs in favor of the plaintiffs, which shall inure equally for the benefit of those bringing the suit, and of them only."

The defendant demurred to the declaration, which consists of one count only, on the following grounds, viz.: 1. That the plaintiff's intestate could not have maintained an action for damages against the defendant, had he survived, and therefore the plaintiff in this case has no right of action against said defendant; 2. That said action is improperly brought under chapter 233, section 14, of the General Laws; 3. That said plaintiff's intestate, not being recognized by the law as a person capable of having a standing in court, cannot be represented by the plaintiff in this case; 4. That said plaintiff, who sues in his representative capacity as next of kin of Patrick Gorman, Junior, seeks to recover for money expended in his individual capacity.

¹⁷² Inasmuch, as to enable the plaintiff to recover, the act, neglect or default must have been such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the question at once presenting itself is, Can one maintain an action for injuries received by him while in his mother's womb?

The plaintiff has prepared an ingenious brief, and lays great stress upon the acts an unborn child can do, citing many authorities, and seeking by analogy to reach the conclusion to which he would have the court arrive. Unquestionably, an unborn child

has many rights and privileges, but it matters not what rights and privileges it has if it had not the right, had it lived, to maintain an action for the injury alleged to have been suffered in this case.

In *Walker v. Great Northern Ry. Co.*, L. R. 28 Ir. 69, decided in 1891, the plaintiff, an infant of a few months of age, brought an action for personal injuries against the defendant for injuries sustained by her while *en ventre sa mere*, whereby she was permanently crippled and deformed. The child's mother was a passenger on the defendant's railroad and suffered injuries during her pregnancy, and brought action and recovered damages for her own injury. The infant plaintiff also brought suit, which is the one referred to. The case was learnedly argued and considered, and the judges delivered their opinions *seriatim*, and were unanimous that the action could not be maintained. The question, however, whether such an action could be maintained under any circumstances by an infant who was in its mother's womb at the time of the alleged injury was discussed elaborately and with great learning both by court and counsel. O'Brien, C. J., after discussing the question, expressly declined to commit himself, leaving it, as far as he was concerned, "an open question." The other judges treated the matter in a broader and more comprehensive manner. Johnson, J., discussed the matter with great affluence of learning, and said, on page 84, *inter alia*: "As matter of fact, when the act of negligence occurred the plaintiff was not in *esse*, was not a person, or a passenger, or a human being. Her age and her ^{17th} existence are reckoned from her birth, and no precedent has been found for this action. Lord Coke says: 'Although *filius in utero matris est pars viscerum matris*, yet the law in many cases hath consideration of him in respect of the apparent expectation of his birth': *Earl of Bedford's Case*, 7 Rep. 8b. This imputed existence in *esse* to an unborn child is a fiction of the civil law, which regards an unborn child as born for some (not for all) purposes connected with the acquisition and preservation of real or personal property. . . . Thus it would appear that according to this fiction an unborn child may in the civil law at the same moment be regarded as in *esse* and not in *esse*; for its own benefit in *esse*, to its prejudice not in *esse*, and unless for the benefit of itself not in *esse*. As the civil law prevailed in the ecclesiastical and admiralty courts, and also entered largely into the jurisprudence administered in the court of chancery,

most of the authority by which an unborn child is for its own benefit regarded as born is to be found in the decisions of those courts." After referring to a number of authorities, he proceeds as follows (page 87): "These authorities appear to me to show that the doctrine which regards an unborn child as born for its own benefit (which is the utmost limit of the doctrine), is a fiction adopted from the civil law by the courts of equity, for some, but not for all, purposes, and far more seldom recognized in the courts of law. The present is, and always was, a common-law action for personal injuries caused by the negligence or breach of duty of the defendants, and it lies on the plaintiff to show what was this duty of the defendants toward the plaintiff, and how it arose. Negligence and duty are respectively relative, not absolute, terms. It is not contended that the duty arose out of contract; the contract was between the defendants and Mrs. Walker, and so far as contract is concerned, it was to Mrs. Walker the defendants were liable for breach of it. If it did not spring out of contract, it must, I apprehend, have arisen (if at all) from the relative situation and circumstances of the defendants and plaintiff at the time of the occurrence of the act of negligence. But at that time the ¹⁷⁴ plaintiff had no actual existence, was not a human being, and was not a passenger—in fact, as Lord Coke says, the plaintiff was then *pars viscerum matris*, and we have not been referred to any authority or principle to show that a legal duty has ever been held to arise toward that which is not in *esse* in fact, and has only a fictitious existence in law, so as to render a negligent act a breach of that duty." As to analogies drawn from the criminal law, the learned judge says (page 88): "Then it is contended that this action lies in analogy to the criminal law, that if a child born alive afterward dies of injuries received while in utero, this is murder in the person who inflicted them (1 Russell on Crimes, 5th ed., c. 2, p. 646, note e); but I think that there is no true analogy between crime and tort in this case. Crimes are offenses against the public; they are those acts or attempts which tend to the prejudice of the whole community, and, as a general rule, the criminal intent and the act charged to be criminal must concur to constitute a crime. Tort, on the other hand, is a private wrong sustained by some person or body of persons. The sanction of the one is punishment; the result of the other is compensation. . . . In early times, the criminal law as to the infant in utero, just born alive, was far more stringent and

severe, as stated by Bracton, than it is at present. . . . This may be accounted for on principles of public policy, by the stern severity of the criminal law in the supreme exigencies of public safety, where the offense is prosecuted by the crown on behalf of the entire community, for the security of society, the preservation of infant life, and the queen's peace, in order that (as Lord Coke says, 3 Inst. 50) 'so horrible a crime should not go unpunished.' "

In *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14, 52 Am. Rep. 242, decided in 1884, the mother of the deceased slipped upon a defect in a highway of the defendant town, fell, and had had a verdict for her damages. At the time, she was between four and five months advanced in pregnancy, the fall brought on a miscarriage, and the child, although not directly injured, unless by a communication of the shock to the mother, was too little advanced in foetal life to survive its premature birth. There ¹⁷⁵ was testimony, however, based upon observing motion in its limbs, that it did live for ten or fifteen minutes. Administration was taken out, and the administrator brought action upon the Public Statutes of Massachusetts, chapter 52, section 17, for the further benefit of the mother in part or in whole, as next of kin. The court, speaking through Holmes, J., in delivering the opinion, says: "The court below ruled that the action could not be maintained; and we are of the opinion that the ruling was correct. . . . Some ancient books seem to have allowed the mother an appeal for the loss of her child by a trespass upon her person. . . . But no case, so far as we know, has ever decided that, if the infant survived, it could maintain an action for injuries received by it while in its mother's womb. Yet that is the test of the principle relied on by the plaintiff, who can hardly avoid contending that a pretty large field of litigation has been left unexplored until the present moment." After considering various cases and arguments, the learned judge concludes as follows: "Taking all the foregoing considerations into account, and further, that as the unborn child was a part of the mother at the time of the injury, any damage to it which was not too remote to be recovered for at all was recoverable by her, we think it clear that the statute sued upon does not embrace the plaintiff's intestate within its meaning, and have not found it necessary to consider the question of remoteness or the effect of those cases which declare that the statute liability of towns for defects in highways is more narrowly restricted than the common-law liability for negligence."

In *Allaire v. St. Luke's Hospital*, 184 Ill. 359, 75 Am. St. Rep. 176, 56 N. E. 638, decided in 1900, the plaintiff, an infant of tender age, brought suit by his next friend against the defendant for injuries sustained while in the womb of his mother, alleged to have been caused by the negligence of the defendant in an elevator accident on February 2, 1896, whereby the mother was much injured, and thereby the plaintiff was also greatly injured, so that when said plaintiff was born on February 6, 1896, he was permanently crippled and deformed. The mother settled ¹⁷⁶ with the defendant for a valuable consideration, and in the suit brought by the plaintiff, the defendant filed a general demurrer which was sustained by the trial court. Upon an appeal to the appellate court of the first district the judgment of the lower court was affirmed (reported in 76 Ill. App. 441), and from that judgment of affirmance appeal was taken to the supreme court of the state. The opinion of the appellate court, which was adopted by the supreme court, concluded as follows: "The doctrine of the civil law and the ecclesiastical and admiralty courts, therefore, that an unborn child may be regarded as in esse for some purposes, when for its benefit, is a mere legal fiction, which, so far as we have been able to discover, has not been indulged in by the courts of common law to the extent of allowing an action by an infant for injuries occasioned before its birth. If the action can be maintained, it necessarily follows that an infant may maintain an action against its own mother for injuries occasioned by the negligence of the mother while pregnant with it. We are of the opinion that the action will not lie."

The counsel for the plaintiff has called our attention to General Laws of Rhode Island, caption 203, section 23, which provides that a child of a testator born after his father's death, for whom no provision was made by his father by will or otherwise, shall take the same share of his father's estate that he would have been entitled to if his father had died intestate; and also to chapter 210, section 21, by which it is provided that in proceedings in the probate court, the interests of a person unborn may be represented by a guardian ad litem or next friend to be appointed by the court. These statute provisions, however, furnish no analogies for guidance in the case at bar, in our opinion, for a statute only governs the cases to which it was designed to apply, and if chapter 233, section 14, under which this action

was brought, was intended to apply to injuries to unborn infants, such intention should have been expressed in its provisions.

The statute in question is drawn from an English statute, Lord Campbell's act, 9 and 10 Victoria, chapter 93, section 1, and the English common law is the foundation of our system of jurisprudence,¹⁷⁷ and for those feeling there is a hardship in the principle of law as hereinbefore laid down, as an occasional dissenting judge has expressed himself as feeling, we borrow these words of Mr. Associate Justice O'Brien, in *Walker v. Great Northern Ry. Co.*, L. R. 28 Ir. 69, viz.: "We have to see whether the right claimed exists in the English legal system, or flows out of any admitted principles in that system. The law is in some respects a stream that gathers accretions with time from new relations and conditions. But it is also a landmark that forbids advance on defined rights and engagements; and if these are to be altered, if new rights and engagements are to be created, that is the province of legislation and not of decision."

In our opinion, one cannot maintain an action for injuries received by him while in his mother's womb, and consequently his next of kin under the statute after his death cannot maintain an action therefor, and so the demurrer must be sustained on this ground.

As sustaining the demurrer on this ground is conclusive against maintaining the action, it is unnecessary to consider what damages could have been obtained were the suit maintainable.

Demurrer sustained and case remitted to the common pleas division, with directions to enter judgment for the defendant for costs.

An Unborn Child is not a "person" within the meaning of a statute giving a cause of action for negligent death to the administrator: *Dietrich v. Northampton*, 138 Mass. 14, 52 Am. Rep. 242. Nor may a child maintain an action for injuries received before its birth: *Allaire v. St. Luke's Hospital*, 184 Ill. 359, 75 Am. St. Rep. 176, 56 N. E. 638.

McCAFFREY v. MOSSBERG & GRANVILLE MANUFACTURING COMPANY.

[23 R. I. 381, 50 Atl. 651.]

NEGLIGENCE in Manufacturing or Selling an Article—Third Person, When may not Recover for.—Where a cause of injury is not in its nature imminently dangerous, where it does not depend on fraud, concealment, or implied invitation, and where the plaintiff is not in privity of contract with the defendant, an action for negligence cannot be maintained. (p. 642.)

MANUFACTURER OF MACHINE—When not Answerable to a Third Person for Defects in.—Negligence in the manufacture of a machine whereby an employé of the purchaser is injured will not sustain a recovery in favor of the latter against the manufacturer when the machine is not of an imminently dangerous character, as where it is a machine for use by a manufacturing jeweler, and, through a defect in the materials from which it was made, a hook broke and caused a weight to fall upon and injure an employé. (p. 642.)

Action of trespass on the case in which a demurrer to the plaintiff's complaint was interposed.

Page, Page & Cushing, for the plaintiff.

Comstock & Gardner, for the defendant.

382 STINESS, C. J. This is an action of trespass on the case for negligence. The declaration alleges, in substance, that the plaintiff was in the employ of George W. Dover, a manufacturing jeweler, and while engaged in operating a drop press, in which was a heavy weight held by a hook, the hook broke and the weight fell upon his hand and injured it; that the machine was manufactured by the defendant and sold to Dover; that it was the duty of the defendant to use due care in the manufacture thereof, but that the machine was negligently built and defective, in this—that the hook was made of iron or steel of poor quality, of insufficient size; that the hook had been improperly welded, with cracks or crevices through the hook; that the defendant knew, or had reason to know, and, but for want of reasonable care, would have known, that the machine, when it was sold, was a dangerous appliance, liable to endanger the life and limb of an operator using due care by the breaking of said hook and the falling of the weight.

The defendant demurs to the declaration. The case raises the question whether the maker of a machine which he sells to another is liable to a third person for injuries arising from neg-

ligence in its construction. This question has frequently been before other courts, but it has not been raised before in this state.

Cases which involve the liability of a defendant to those with whom he does not stand in privity of contract may be grouped into three classes: 1. Where the thing causing the injury is of a noxious or dangerous kind; 2. Where the defendant has been guilty of fraud or deceit in passing off the thing; 3. Where the defendant has been negligent in ³⁸³ some respect with reference to the sale or construction of a thing not imminently dangerous.

The principle that governs the first class of cases is that one who deals with an imminently dangerous article owes a public duty to all to whom it may come, and whose lives may be endangered thereby, to exercise caution adequate to the peril involved. This principle has been applied in many cases of the sale of poisonous drugs under a false label.

Such was the leading case in this country of *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455, in which, as one ground of inference of public duty, the court said: "Every man who, by his culpable negligence, causes the death of another, although without intent to kill, is guilty of manslaughter." Hence it argued that the duty of exercising caution did not arise out of the contract of sale, so as to be confined to the immediate vendee; but that the wrong done was the putting out of the poison, as an article of merchandise, to be sold and afterward used, under another name, by some person then unknown. The same opinion has been expressed in *Wellington v. Downer*, 104 Mass. 64, in which dangerous naphtha was sold; in *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298, in which laudanum was sold for rhubarb; in *Davis v. Guarnieri*, 45 Ohio St. 470, 4 Am. St. Rep. 548, 15 N. E. 350, *Elkins v. McKean*, 79 Pa. St. 493, and in *George v. Skivington*, L. R. 5 Ex. 1, relating to inherently dangerous articles; and *Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311, where the defect in a scaffold was held to be imminently dangerous. The principle of these cases may be supported on two grounds: That of an illegal act, when, as in most states, there are statutory provisions which impose a public duty upon those who deal with poisons and dangerous substances, like gunpowder, naphtha, etc.; and that of the duty which the law imposes upon every one to avoid acts which, in their nature, are dangerous to the lives of others. Of this class familiar examples are those who allow vicious animals to run at large, and who throw deadly

missiles into a gathering of people. The putting forth of a dangerous article or substance, which is quite as sure to injure somebody, is not essentially different.

A similar principle governs the second class of cases, in ³³⁴ which the degree of danger in the thing itself may be less, but where the seller actually knows of the danger in the article and puts it forth by some fraud or deceit. In such cases the breach of duty grows out of the fraud or deceit in the sale, and it extends to persons injured thereby, who may reasonably be deemed to be within the contemplation of the parties to the transaction. Thus, in *Levy v. Landridge*, 4 Mees. & W. 336, the allegations were that a father bought a gun of the defendant, for the use of himself and sons, upon the special warranty that it was made by a certain manufacturer, and that it was a good, safe, and secure gun, whereas it was unsafe, ill-made, and dangerous; that the defendant was guilty of willful deceit, negligence, and improper conduct in the sale, and that the gun burst in the hands of a son. The judgment was that, as there was fraud and damage, the result of that fraud not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud was responsible to the party injured.

In *Lewis v. Terry*, 111 Cal. 39, 52 Am. St. Rep. 146, 43 Pac. 398, the defendant sold a folding-bed to the plaintiff's landlord, knowing it to be dangerous, because of concealed defects, and he was held to be liable to the plaintiff, who had hired the furnished room, for an injury caused by such defect. The court said: "The fact insisted upon by respondent that a bed is not ordinarily a dangerous instrumentality, is of no moment in this case; if mere nonfeasance or perhaps misfeasance was the extent of the wrong charged against defendants, that consideration would be important (*Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455); but the fact that such articles are, in general, not dangerous, would seem to enhance the wrong of representing one to be safe for use when known to be really unsafe, for the danger is thus rendered more insidious."

In *Davies v. Pelham etc. Elevating Co.*, 65 Hun, 573, 20 N. Y. Supp. 523, 76 Hun, 289, 27 N. Y. Supp. 709, remarks were made to the effect that the action could be maintained against the builder of a derrick for a painter by the administratrix of an employé killed by a defect therein upon

the ground of simple ³⁸⁵ negligence; but the case turned upon the fact that the defective rope had been selected by the deceased himself, and not upon the question about which the court expressed its opinion.

Bright v. Barnett Record Co., 88 Wis. 299, 60 N. W. 418, a case for the death of an employé caused by a defective staging built by the defendant for the employer, was sustained upon the ground of an implied invitation: See, also, *Heaven v. Pender*, L. R. 11 Q. B. D. 503; *Necker v. Harvey*, 49 Mich. 517, 14 N. W. 503.

The case of *Schubert v. Clark*, 49 Minn. 331, 32 Am. St. Rep. 559, 51 N. W. 1103, chiefly relied on by the plaintiff, really belongs to this class of cases in which an element of fraud appears. The defendant corporation made and sold ladders. The allegations were that the plaintiff was injured by the breaking of a ladder sold by the defendant to the plaintiff's employer; that it was made of poor, cross-grained, and decayed lumber, and that this defect had been so concealed by oil, paint, and varnish that a person could not discover that it was made of defective material. If this was so, the defendant's servants must have known of the defect, because it was patent and they concealed it. A corporation can act only through its agents and servants. Hence their knowledge is imputed to the corporation. It was clearly a deceit so to cover up the defect in the ladder. One part of the opinion treats it as a deceit, although the opinion goes to the extent of saying that the defendant was responsible for negligence.

Bishop v. Weber, 139 Mass. 411, 52 Am. Rep. 715, 1 N. E. 154, is also relied on by the plaintiff. In that case a caterer who furnished food at a ball was sued for providing unwholesome food. But in that case the declaration averred that the defendant agreed to furnish good and wholesome food to all who might wish it, and to be paid therefor the sum of one dollar and twenty-five cents by each and every person who partook thereof; and that the plaintiff had such ticket, etc., so paid for. The declaration did not aver knowledge or fraud on the part of the defendant. The court said that it would be hard to establish an implied contract with each individual; but we are unable to see why this should be so. It seems to be a most natural conclusion under ³⁸⁶ the circumstances, or, at least, that, as in the case of a staging for workmen, there was an implied invitation by the defendant to partake of the food, such as to raise an implication of duty. The ground

upon which the court sustained the declaration was this: "The furnishing of provisions which endanger human life or health stands clearly upon the same ground as the administering of improper medicines, from which a liability springs irrespective of any question of privity of contract between the parties." The court cites as authorities, *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298, which related to a deadly poison; *Longmeid v. Holliday*, 6 Ex. 761, where an unsafe lamp had been sold to the husband of the injured plaintiff, but the court gave a nonsuit because neither knowledge nor fraud was shown, and the lamp was not in its nature dangerous; *Pippin v. Sheppard*, 11 Price, 400, which was a case of unskillful treatment by a surgeon. We fail to see how the declaration could have been sustained on the authority of either of these cases.

The third class of cases relating to the sale of a thing not in its nature dangerous rests on the principle that as to such things there is no general or public duty, but only a duty which arises from contract, out of which no duty arises to strangers to the contract.

The leading case of this class is *Winterbottom v. Wright*, 10 Mees. & W. 107. The plaintiff was a mail coachman, who was injured by a latent defect in a mail-coach which the defendant, under a contract with the postmaster general, was to keep in good repair. It was held that the plaintiff could not recover. The grounds of the decision were that the case was not like *Levy v. Landridge*, 4 Mees. & W. 336, "for there the gun was bought for the use of the son, the plaintiff in that action, who could not make the bargain himself, but was really and substantially the party contracting. Here the action is brought simply because the defendant was a contractor with a third person; and it is contended that thereupon he became liable to everybody who might use the carriage." Also, that the case was not like those which amounted to a public nuisance, and hence raised a public duty; that, consequently, ³⁸⁷ there being neither privity of contract nor public duty, the action could not be maintained.

The case was followed in *Collis v. Selden*, L. R. 3 C. P. 495, where the defendant negligently and improperly hung a chandelier in a public house, which fell upon the plaintiff. The opinions in the case stated that, there being no public nuisance, no privity of contract, no fraud or concealment, no invitation, and no actual knowledge, the action would not lie.

In both cases it was said that there would be no end of cases if the action could be sustained.

It is needless to examine critically the numerous cases on this question, because they rest upon the application of the principles stated above. See *Curtin v. Somerset*, 140 Pa. St. 70, 23 Am. St. Rep. 220, 21 Atl. 244, where a hotel was improperly constructed; *Loop v. Litchfield*, 42 N. Y. 351, 1 Am. Rep. 543, which involved the bursting of a balance-wheel; *Losee v. Clute*, 51 N. Y. 494, 10 Am. Rep. 638, the explosion of a steam boiler; *Heizer v. Kingsland Mfg. Co.*, 110 Mo. 605, 33 Am. St. Rep. 482, 19 S. W. 630, the explosion of a cylinder of a steam threshing-machine; *Bragdon v. Perkins etc. Co.*, 87 Fed. 109, an unsafe side-saddle; *Caledonian etc. Ry. Co. v. Mulholland*, L. R. App. Cas. (1898) 216; *Savings Bank v. Ward*, 100 U. S. 195, an attorney's certificate of title. In all of these cases the right of the plaintiff to recover was denied.

We think that the result of the cases on this subject clearly establishes the weight of authority in favor of the rule that where the cause of the injury is not in its nature imminently dangerous, where it does not depend upon fraud, concealment, or implied invitation, and where the plaintiff is not in privity of contract with the defendant, an action for negligence cannot be maintained.

The reason for the rule is well stated in *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455, as follows: "If A build a wagon and sell it to B, who sells it to C, and C hires it to D, who, in consequence of the gross negligence of A in building the wagon, is overturned and injured, D cannot recover damages against A as the builder. A's obligation to build the wagon faithfully arises solely out of his contract with B. The public have nothing to do with it. Misfortune to third persons not parties ³⁸⁸ to the contract would not be a natural and necessary consequence of the builder's negligence; and such negligence is not an act imminently dangerous to human life."

The declaration in this case simply charges negligence, without any of the other necessary elements, and hence the demurrer to the declaration must be sustained.

Damages.—In *Boston Woven Hose etc. Co. v. Kendall*, 178 Mass. 232, 86 Am. St. Rep. 478, 59 N. E. 657, it is held that if a first-class boilermaker makes a boiler for a manufacturer to be used for certain purposes, and delivers it with a patent defect, he is liable to the manufacturer for damages paid by the latter to his employes for injuries resulting from the defect, although the manufacturer was

negligent in using the machine without inspection. And in *Schubert v. J. R. Clark Co.*, 49 Minn. 331, 32 Am. St. Rep. 559, 51 N. W. 1103, it is held that if a painter using a stepladder is injured by its breaking because made of defective timber, he may recover damages of the manufacturer, when he knew, or should have known, its condition.

O'ROURKE v. HANCOCK MUTUAL LIFE INS. CO.

[23 R. I. 457, 50 Atl. 834.]

INSURANCE, LIFE—Agent Procuring Insurance Who Deemed to be the Agent of.—An agent, in simply procuring insurance, is deemed to be the agent of the applicant, and not of the insurer, and the applicant is answerable for his mistakes and false answers. Testimony of what was said to and by the solicitor is, therefore, immaterial. (p. 645.)

INSURANCE, LIFE—Warranty—Burden of Proof.—Answers in an application for life insurance respecting the previous illness of the insured and his consulting physicians, and the like, are warranties which must be proved by the plaintiff, but which, for convenience of trial, may stand on presumption of prima facie evidence until contradicted. (p. 645.)

INSURANCE, LIFE—Answers of Applicant Known by the Insurer to be False.—Where an insurance corporation is in actual possession of knowledge of a fact, and by turning to its own records can assure itself better than by the imperfect memory of the applicant, it is a perversion of the purpose of warranty to allow it to avoid its contract (pp. 645, 646.)

INSURANCE, LIFE—Insurer, Whether Bound to Have Present Knowledge of Its Files.—Where the answers of an applicant for life insurance stated that the insuring corporation had never refused an insurance on his life, a recovery cannot be defeated on the ground that such answer was false, if the corporation, by an examination of its files, must have seen that a previous application on behalf of the same person had been by it rejected. (p. 646.)

INSURANCE, LIFE.—An Infant is Not Bound by His Warranties in a Contract of Insurance. Hence a policy insuring his life cannot be defeated, where he has died before his majority, by proving that the answers made to questions propounded in the application were false. (p. 648.)

INFANTS—The Plea of Infancy is not always a Privilege Personal to an Infant.—Its chief application is for his protection in cases where the adult seeks to avoid his contract on that ground when it has not been disaffirmed by the infant. It cannot be relied upon for the purpose of showing that an infant is bound by a warranty in a contract of insurance, he having died before disaffirming it. (pp. 648, 649.)

INSURANCE, LIFE—Estoppel Against Beneficiary.—Where a policy issues insuring the life of a minor, containing warranties which are not binding on him because of his infancy, the beneficiary

is not, upon the minor's death, estopped from recovering on the policy, if she did not procure the insurance with knowledge of the false statement. (p. 649.)

Assumpsit on a policy of life insurance. Verdict for the plaintiff, and the defendant petitioned for a new trial.

Irving Champlin, for the plaintiff.

Doran & Flanagan, for the defendant.

458 STINESS, C. J. This is an action on a policy of life insurance, in which the plaintiff is the beneficiary, upon the life of her son, a boy fifteen years old when the policy was issued. The defense is that the application contained false answers to questions which are made warranties by the terms of the policy. To the question, "Has this company ever refused to issue a policy on this life?" the answer was "No."

The plaintiff admits in her testimony that she knew that 459 the boy had been previously rejected by this company, and says that she and her husband stated the fact to the agent who took the application and wrote in the answers, but that she did not know what he wrote.

A question and answer of the same import is repeated on the back of the application in the statement to the medical examiner.

Another question: "When did you last consult a doctor, and for what?" was answered: "Two years ago; bronchitis, not predisposed."

Another question, asking if the boy had ever had any serious illness from either one of fifteen diseases named, including rheumatism, was answered "No."

A previous application had an answer that the boy had consulted a doctor for rheumatism in January, 1893.

The case was tried to a jury, and a verdict was rendered in favor of the plaintiff for the sum of two hundred and forty-three dollars and forty cents, the amount claimed; and the defendant petitions for a new trial upon the grounds that the verdict was against the evidence and that there were errors of law in rulings at the trial.

The first, third, fifth, and sixth exceptions were to the admission of testimony by the plaintiff that at the time of this application the defendant's agent was told that the applicant had been previously rejected by this company, and as to the powers of the agent. Taken by themselves, the rulings were

erroneous. In *Reed v. Equitable Ins. Co.*, 17 R. I. 785, 24 Atl. 833, this court adhered to the rule, recognized in this state since *Wilson v. Conway etc. Ins. Co.* (1856), 4 R. I. 141, that an agent in simply procuring insurance is the agent of the applicant, and not of the company, in drawing the application, and that the applicant is responsible for his mistakes and false answers: See, also, *Bryan v. National etc. Assn.*, 21 R. I. 149, 42 Atl. 513. Testimony of what was stated to or by the solicitor was therefore immaterial. The effect of these rulings will be considered later.

The second exception related only to the form of a question claimed to be leading, which is not important.

The fourth exception was to the refusal of the trial judge 460 to direct a verdict for the defendant, because of failure to prove the warranties embraced in the questions and answers stated above.

It was held in *Sweeney v. Metropolitan Ins. Co.*, 19 R. I. 171, 61 Am. St. Rep. 751, 36 Atl. 9, that such answers are warranties which must be proved by the plaintiff, but which, for convenience of trial, may stand on presumption or prima facie evidence until contradicted, like the signature and consideration of a promissory note. There was, however, testimony that the answers were true except as to rheumatism and the previous rejection, which will be considered under the seventh and eighth exceptions.

The seventh exception relates to an alleged statement by the solicitor that the former rejection was an immaterial matter, which statement, if made, would bind the company. It does not appear from the charge that the judge so ruled; but inasmuch as the jury were allowed to consider the fact whether the agent made the statement, the exception is applicable. The solicitor, in making the application, being, as we have said, the agent of the insured, would not bind the company by his statements. But another question is presented which renders this question of fact, of what the agent said, quite unimportant. The previous application was in the hands of the company. The rejection of it was by the defendant itself. The purpose of warranties in a policy is not to set a trap for applicants, but to inform the company about important facts upon which the contract is based. When, therefore, a company is in actual possession of knowledge of a fact, and by turning to its own record can assure itself better than by the imperfect memory of an applicant, it is a perversion of the purpose of a war-

ranty to allow it to avoid a contract. It is evident injustice for one party to allow another to enter into a contract which the former knows or is bound to know is invalid. As stated in *Reed v. Equitable Ins. Co.*, 17 R. I. 785, 24 Atl. 833, it is taking advantage of one's wrong: See, also, *Greene v. Equitable Ins. Co.*, 11 R. I. 434.

The defendant argues that it is unreasonable to hold that a company is bound to have present knowledge of all that appears on its previous files. To this suggestion at the trial ⁴⁰¹ the judge asked the very pertinent question: "Any more so than it was to ascertain that fact just after the boy died? They have taken the money. Now, just as soon as the boy died and the beneficiary asks to be paid, then their records are looked up; then they saved the record." The company had exactly the same information in its possession at the time the contract was made that it has now. If it is available at one time it ought to be imputable at the other. But it is said that the company cannot be supposed to know that it is the same person, even though the name may be the same. While this might be so in some cases, we do not see that there would be any uncertainty in this case, because the applications identify the same applicant by date of birth, age, town, occupation, and parents' names. There was ample opportunity for examination, as the application was dated July 22, 1896, the medical examination was August 22, 1896, it is stamped, doubtless by the company, September 2, 1896, and the policy was not issued until September 9, 1896.

In *Jerrett v. John Hancock Ins. Co.*, 18 R. I. 754, 30 Atl. 793, there had been a previous rejection, but the policy was held to be void, because neither application stated the fact, called for by a question, that a sister of the assured had died of consumption. This was a fact that the company could not be held to know, and hence the case was essentially different from the case at bar.

The answer about rheumatism stands in a somewhat different relation.

The first application was dated March 3, 1893, and it stated that the boy had consulted a physician for about four attacks of rheumatism in January. The company had no possible knowledge from this that he had rheumatism, and may have relied upon the denial of it in the present application as showing that his trouble, which he thought to be, turned out not to be, rheumatism. The evidence of the plaintiff was that he

had rheumatism. This might have been after the first application, and so outside of any implied notice. Up to this point we find no ground for a new trial, because the statements to the solicitor did not prejudice the defendant by ⁴⁶² reason of the knowledge of the facts imputed to it in its previous rejection of the applicant.

The answer about rheumatism is included in the general ground of defense raised by the eighth exception, which is to the refusal of the court to charge as follows: "If the boy did sign an application containing a material untrue statement, the beneficiary is bound and the policy is void."

The defendant had notice from the application itself that it was dealing with a minor and taking his warranties. The question, therefore, is whether an infant is bound by his warranties in a contract of insurance. In considering it we have not the advantage of weighing the reasons given in previous decisions, for we have been unable to find a case like this reported. Certain principles, however, are well settled in regard to infancy.

It is an elementary rule that infants are incapable of making contracts, except for necessities. Such contracts are voidable, but not void. The infant may avoid his contract, but an adult contracting with him cannot. A contract may thus be binding on an adult when it is not binding on an infant: *Dearden v. Adams*, 19 R. I. 217, 36 Atl. 3; *Shurtleff v. Millard*, 12 R. I. 272, 34 Am. Rep. 640.

As an infant is not liable on his contract, he is not liable for warranties or representations upon which the contract is based. Thus, in *West v. Moore*, 14 Vt. 447, 39 Am. Dec. 235, it was held that infancy was a bar to an action founded upon a false and fraudulent warranty upon the sale of a horse: *Prescott v. Norris*, 32 N. H. 101. In *New Hampshire Ins. Co. v. Noyes*, 32 N. H. 345, the contract was for fire insurance on the property of an infant. It was held that it was not a contract for necessities, and that the infant was not liable on his premium note. In *Doran v. Smith*, 49 Vt. 353, it was held that infancy was a bar to an action on the case for false and fraudulent representations by a vendor or pledgor as to his ownership of property sold or pledged. In *Gilson v. Spear*, 38 Vt. 311, 88 Am. Dec. 659, the court said that an infant is liable in an action *ex delicto* for an actual and willful fraud only in cases in which the form of action does not suppose that a contract has existed; ⁴⁶³ but that, when the gravamen

of the fraud consists in a transaction which really originated in contract, the plea of infancy is a good defense: See notes to this case in Ewell's Leading Cases, 206; *Freeman v. Boland*, 14 R. I. 39, 51 Am. Rep. 340. The principle of these cases is that infancy is a bar for misrepresentation based upon a contract. It is to be noted that the cases cited were brought by the adult against the infant. But if the plaintiff cannot sue the infant upon his warranties, upon what principle can he set up the same warranties in defense? In either case he is seeking to enforce the contract as made by the infant. In *Derocher v. Continental Mills*, 58 Me. 217, 4 Am. Rep. 286, where a minor who had agreed to work for the defendant for six months, at least, and to give no less than two weeks' notice before leaving, left within six months and without giving such notice, the question was whether the defendant could deduct the damages occasioned thereby from what he would otherwise be entitled to recover for his labor. The court held that no deduction could be made, saying: "To compel the minor thus to make good the loss occasioned by the nonperformance of his contract is virtually to enforce the contract; and thus to enforce the contract is in effect to abrogate the rule of law that a minor is not bound by his contract."

This language was quoted in *Shurtleff v. Millard*, 12 R. I. 272, 34 Am. Rep. 640, apparently with approval, although the decision of the court in that case proceeded upon the theory that, as there was no binding contract, the plaintiff could recover reasonable compensation, which might include a deduction for injury done.

We think the reasoning of *Derocher v. Continental Mills*, 57 Me. 217, 4 Am. Rep. 286, is sound, and that the terms of a minor's contract can no more be set up defensively than offensively.

The defendant argues that the answer of infancy is a privilege personal to him, and that it cannot be taken advantage of by anyone else. Undoubtedly, this is a general rule, but its chief application is for the protection of the infant in cases where an adult ⁴⁶⁴ seeks to avoid his contract upon that ground, when the contract has not been disaffirmed by the infant.

To apply the rule in this case would amount to holding the contract good during the minority of the infant, because, the policy being on his life, no suit could be brought upon it until after his death. He could only disaffirm it by refusing to pay

premiums and thus forfeiting the policy. If it were an endowment policy maturing before his majority, it follows, from what we have said, that he could sue upon it without being bound by his warranties. If, after majority, he should continue to pay premiums, he might be regarded as having affirmed the contract, as in *Morrill v. Aden*, 19 Vt. 505.

Our conclusion is that during the minority of the applicant his warranties cannot be set up in defense to a suit upon the policy. But, even if this is so, the defendant argues that the beneficiary cannot recover because, the policy being conditional upon the truth of the statements, she is estopped by false statements on the face of the contract. Undoubtedly this would be the rule in the case of a valid contract, because she could recover only on the terms of the contract. This contract purports to have been made with the minor. The beneficiary has made no statements of her own. If the warranties are not binding upon the minor, then in legal effect they are not a part of the contract, and the beneficiary is not estopped by them. This does not mean that a beneficiary may not be estopped by fraudulent conduct of her own. For example, if she had procured the insurance on this application with knowledge of the false statements. But we do not find that fact in this case.

A copy of the medical examination is on the back of the policy, and it is claimed that notice is imputed to her of its contents. Even so, it shows only a denial of any serious illness from rheumatism; and while it appears from the testimony that "he has had rheumatism," it does not appear that it was serious so as to charge the plaintiff with knowledge of a false warranty. There was a conflict of testimony as to her knowledge of the statements, and it does not clearly ⁴⁶⁵ appear from the record that much stress was laid upon the fact.

We must assume, however, that the question was before the jury, otherwise the testimony would have no relevancy; and, from the verdict for the plaintiff, that she did not know the contents of the application. It therefore appears that she is not estopped by the terms of the contract, nor by any conduct of her own which precludes her from recovery.

We think that the defendant is not entitled to a new trial, either upon the ground of erroneous rulings or verdict against the evidence.

The Agents of Insurance Companies, authorized to procure applications for insurance, and forward them to the company for acceptance,

are regarded as the agents of the insurer, and not of the insured. If, therefore, they make out applications incorrectly, when the applicant has stated the facts correctly, the errors are chargeable to the insurance company: See the monographic note to *Clark v. Union etc. Ins. Co.*, 77 Am. Dec. 724; *Triple Link etc. Assn. v. Williams*, 121 Ala. 138, 77 Am. St. Rep. 34, 26 South. 19; *German Ins. Co. v. Hayden*, 21 Colo. 127, 52 Am. St. Rep. 206, 40 Pac. 453; *Continental Ins. Co. v. Chew*, 11 Ind. App. 330, 54 Am. St. Rep. 506, 38 N. E. 417; *Sternman v. Metropolitan Life Ins. Co.*, 170 N. Y. 13, 88 Am. St. Rep. 625, 62 N. E. 763. Compare the note to *Continental Ins. Co. v. Yung*, 3 Am. St. Rep. 638.

Answers in an Application for Life Insurance as to freedom from specific diseases are considered warranties: *Mutual Life Ins. Co. v. Simpson*, 88 Tex. 333, 53 Am. St. Rep. 757, 31 S. W. 501; note to *Continental Ins. Co. v. Yung*, 3 Am. St. Rep. 634-637.

STATE v. TERLINE.

[23 R. L. 530, 51 Atl. 204.]

PERJURY—Indictment for—Words, How to be Set Out.—Neither at the common law nor under the statutes generally prevailing in the United States is it necessary to set out the precise words of the testimony alleged to have been false. (p. 652.)

PERJURY in a Foreign Language—Indictment for.—Though the testimony was given in a foreign language, it is not necessary, in an indictment for perjury, to show that fact or to state in such language the testimony alleged to have been false. It is sufficient to set out in English the substance of the testimony. (p. 654.)

PERJURY—Variance in Indictment for—When Immaterial.—A mistake in an indictment for perjury respecting the testimony of the accused, in so far as it related to a place or locality, is not descriptive of the identity of the offense, and is hence not a legal essential thereof. (p. 657.)

EVIDENCE—Foreign Language—Testimony of What Interpreter Said at the Former Trial.—On the trial of an indictment for perjury claimed to have been committed by testimony given at a prior trial in a foreign language, and then interpreted to the court and jury, it is error to permit a witness to testify to the translation of the testimony as made at such former trial by the interpreter. What he there said must be regarded as hearsay only. The only exception to this rule arises where the interpreter acted as agent of the witness in translating his testimony. (pp. 657, 658.)

Indictment for perjury. Accused was convicted and petitioned for a new trial.

Charles F. Stearns, assistant attorney general, for the state.

Franklin P. Owen, for the defendant.

531 TILLINGHAST, J. This is an indictment against the defendant, charging him with having committed the crime of perjury while testifying as a witness in the district court of the sixth judicial district, on the fifteenth day of September, 1899, in the trial of a complaint and warrant wherein Reuben R. Baker was complainant and Francesco Di Nardo was defendant. Upon the trial of said indictment the defendant was convicted; and he now petitions for a new trial on the grounds that the verdict was against the law and the evidence, and that the trial court erred in certain of its rulings.

The defendant is an Italian and unable to speak English, and he gave his testimony in the Italian language in said district court, Mr. Frank Raia acting as interpreter.

We will first consider the defendant's objection to the sufficiency of the indictment, which appears in the following request to charge: "The defendant requests the court to charge the jury that as it appears from the evidence that the defendant gave his testimony in the sixth district court in the case against Francesco Di Nardo in the Italian language, and the jury find that the testimony was so given, then, inasmuch as the indictment charges that the testimony was given in the English language, there is a variance between the evidence and the indictment, and the defendant must be found not guilty." The court refused so to charge, and the defendant excepted.

The question raised by the exception is whether the language actually used by the defendant must be set out in the indictment or whether it is sufficient to set out the substance thereof in the English language, as was done in this case.

Counsel for defendant contends that the indictment should 532 have set out in the Italian language what it was claimed that the defendant said; that if this had been done it would have been easy to show how the interpreter made the error in his interpretation, to which reference will be made hereafter; that such is the rule in civil cases, in slander and libel, and that the rules of pleading in criminal cases are much stricter than in civil. He also claims that under the statute relating to perjury the charge should have been in the Italian language, as otherwise it is not substantially set forth in the indictment.

General Laws of Rhode Island, caption 285, section 5, reads as follows: "In every indictment for perjury, or subornation of perjury, or incitement to perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, and by what court or before whom the oath or affirmation was

taken, averring such court or person to have had competent authority to administer the same, together with the proper averment or averments to falsify the matter wherein the perjury is assigned, without setting forth any part of any record or proceeding, either in law or equity, other than as aforesaid, and without setting forth the commission or authority of the court, or person or persons before whom the perjury was committed, or was agreed, or promised, or procured, or incited to be committed."

This section is substantially the same as the English statute, 23 George II, chapter 11, passed in 1750. Before the passage of that statute indictments were very prolix, reciting the organization of the court before which the perjury was alleged to have been committed, and also the whole of the proceedings. And said statute was intended to relieve the public prosecutor from the difficulties attending that mode of proceeding: 2 Chitty's Criminal Law, 307. And under the English decisions since the statute it is only necessary to state the substance of the offense, the name of the court, a simple averment of the court's authority to administer the oath, and proper averments of the falsity of defendant's testimony: *People v. Phelps*, 5 Wend. 9. Indeed, even under the common law, we do not find that it was necessary to set out the ⁵³³ precise words of the testimony alleged to have been false: 16 Ency. of Pl. & Pr. 333; 2 Bishop's Criminal Procedure, sec. 843.

In most, if not all, of the United States, similar statutes have been enacted, and it has been uniformly held thereunder that in indictments for perjury it is not necessary to set out the exact language used by the defendant on the occasion when he is charged with having committed said crime, but only the substance thereof, except, perhaps, in those cases where his testimony was reduced to writing and signed by him: *McClain on Criminal Law*, sec. 877; *State v. Umdenstock*, 43 Tex. 554. All that is necessary is that the indictment shall set forth the substance of the offense charged in a plain, intelligible, and explicit manner, with such fullness that the court can see that it is charged, and that it gives to the defendant such information as is necessary to enable him to make his defense, and also to protect him in case of a subsequent prosecution for the same offense. In short, an indictment for perjury is good if it shows that in a judicial proceeding before a court having jurisdiction, or before a person having authority to administer the oath, the person accused willfully made oath to a state-

ment of a material fact and that such statement was knowingly false: *Commonwealth v. Carel*, 105 Mass. 582. See, also, *United States v. Walsh*, 22 Fed. 644; 2 *Bishop's Criminal Procedure*, 1st ed., sec. 859; *State v. Stillman*, 47 Tenn. (7 Cold.) 341; *Woods v. State*, 82 Tenn. (14 Lea) 460; *State v. Neal*, 42 Mo. 119; *State v. Spencer*, 45 La. Ann. 1, 12 South. 135; *People v. Ostrander*, 64 Hun, 340, 19 N. Y. Supp. 324, 328.

As to the contention of defendant's counsel that the indictment should have set out in the Italian language the words used, we are clearly of the opinion that it is not well founded. If it is only necessary to set out the substance of what the defendant swore to in the proceeding in which he is charged with having committed perjury, it logically follows that it is immaterial in what language or dialect the witness spoke. The real question is, What did the defendant in effect swear to? What fact did he evidently intend to convey by the language used?

In *Regina v. Thomas*, 2 Car. & K. 806, a similar question ⁵³⁴ was raised and passed upon. There the indictment charged that the defendant, before a magistrate, on the investigation of a charge of riot against certain other persons, falsely, willfully, etc., swore "in substance and to the effect following, that is to say." (In the indictment was here set out in totidem verbis and in the first person, a deposition of defendant in the English language, with proper innuendoes.)

It was proved that the defendant was examined before the magistrate in the Welsh language through an interpreter, and that his examination was translated into English and taken down in writing by the witness and signed by the defendant, this written deposition being that which was set out in the indictment and which was produced on the trial.

The defendant contended that the evidence given by the defendant before the magistrate ought to have been set out in the indictment in the Welsh language with a translation in the English language, and not an English translation only; that it might have been sufficient to have stated the substance of the Welsh words, but that the indictment, setting out the deposition in the first person, professed to give the very words, and must therefore do so correctly. In support of this contention the defendant cited the case of *Zenobio v. Artell*, 6 Term Rep. 162.

Vaughan Williams, J., said: "That was a case of libel, where proof of the precise language is necessary. In perjury it is

only necessary to prove the 'substance and effect.' The indictment charges that the defendant deposed and swore in substance and to the effect there stated. It was not necessary in this indictment to have set forth the deposition in totidem verbis. Still the substance and effect of what the defendant swore in the Welsh language may be proved; and if that is in substance and to the effect the same as is stated in this indictment, that will be sufficient."

Mr. Bishop, in his work on Criminal Procedure, volume 1, section 564, 565, states the rule to be as follows: "If the law requires the tenor of a written instrument to be set out, and the instrument is in a foreign language, the course is to give, in the first place, an exact copy of the original; then to ⁵³⁵ follow it with an English translation. Thus: 'Of the tenor following (here insert the copy of the original, in the original language). And which being translated into the English language, is as follows.' The original, without the translation, is not sufficient; neither is the translation without the original. And, plainly, if the words as translated do not sustain the charge in the indictment it must fail, though the words in the original should be sufficient.

"It is to be borne in mind that the doctrine of the last section refers merely to those cases in which the law requires the tenor of the words or instrument to be set out. Where only the substance is necessary, no principle occurs to the writer requiring any of the foreign forms of the expression to be given. The tenor of a discourse in a foreign language could not be given in English, because this requires the exact words, and these are foreign ones. But the substance does not require the exact words; and, plainly, the substance of a discourse in German or French may be stated in English."

We think the law as thus stated is supported both by reason and authority. No useful purpose could be subserved by incorporating in an indictment of this sort the particular words used by a defendant who speaks a language foreign to our own. And such a practise, if required, would tend to confuse rather than to aid those whose duty it is to try and determine the case. By having the services of an interpreter who is skilled in the particular language used by the defendant when he is alleged to have sworn falsely, his rights are fully protected, and, the indictment being in English, the case is tried in an orderly and intelligible manner.

We are therefore of the opinion that it was not necessary

that the indictment should contain the Italian language used by the defendant as aforesaid, but that it was sufficient that the substance thereof was stated in English.

The defendant also claims that there was a variance between the indictment and the proof in this: That the indictment charges, amongst other things, that defendant testified that he and Di Nardo were at the corner of Spruce and Sutton ^{sse} streets, while the proof was that he stood at the corner of Spruce and Acorn streets.

The indictment charges that the defendant falsely, knowingly, etc., testified in substance as follows, to wit: "That on said afternoon of the aforesaid fourth day of September, the said Francesco Di Nardo did not enter the said house on the said corner of Spruce and Sutton streets, but that the said Francesco Di Nardo remained on the street outside of the aforesaid house in company with him, the said Michele Terline, whereas in truth and in fact, as the said Michele Terline well knew, he, the said Francesco Di Nardo, did enter on the said afternoon of the said fourth day of September the said house on said corner of Spruce and Sutton streets, and did not remain on the street outside of said house in company with him, the said Michele Terline."

The testimony relied on by defendant's counsel to show the variance referred to is that of Frank Raia, the interpreter, and was as follows:

"Q. (By Mr. Stearns, Assistant Attorney General.) On that day, at that trial, what did the defendant Michele Terline have to say in regard to his whereabouts on the 4th of September, 1899? A. Well, he said he had company on that day at his house, and in the afternoon they went out, I think he said to the corner of Acorn and Spruce streets, and they saw a large crowd there and they watched the crowd. Mr. Greenough asked him if he was at this house with Francesco Di Nardo, and he said 'No,' that Francesco Di Nardo did not leave him that day. Mr. Greenough asked me to ask him again and to be sure, and I asked him again, and I said, 'Are you positive that Francesco Di Nardo never left you?' He said, 'He did not leave me.' Then Judge Sweetland asked him or wanted me to ask him again to be sure. He said, 'Be sure to ask him again.' I said, 'Are you positive?' The word 'positive' in English and Italian is almost the same—'positif.' So I asked him again, 'Are you positive that he never went into that house,' and he said, 'Di Nardo never left me.'

"(Cross-examination by Mr. Owen.) Q. What time was it 537 that Michele Terline left the house that day? A. In the afternoon.

"Q. Do you remember the hour? A. I do not.

"Q. Where did he say he went? A. I think he said he went to the corner of Acorn and Spruce streets.

"Q. Who did he say was with him? A. Francesco Di Nardo and the two other Di Nardos, father and son.

"Q. When they got to the corner of Acorn and Spruce streets what did they say they did? A. Watched the crowd.

"Q. And then what did they say they did? A. I do not recollect just what he did say then. I recollect his saying they were going to take a car.

"Q. Did he not say they went to the corner of Acorn and Atwells avenue or some street there to take a car? A. They said that afterward.

"Q. Now, did Michele Terline testify in the district court that day that he went near the corner of Spruce and Sutton streets? A. Yes, sir; he said they came out together on the corner of Acorn, near Spruce.

"Q. Did he say they went near the corner of Spruce and Sutton streets? A. I do not remember.

"Q. Do you want to say they did? A. No.

"Q. Now, as a matter of fact, isn't it a fact that he did not say that he went near the corner of Sutton and Spruce streets? A. I do not remember that; I remember he said he went on the corner of Acorn and Spruce, near Durante's barroom and watched the crowd; that is, in the lower court, when he testified for Francesco Di Nardo."

In view of this testimony, the defendant's counsel requested the court to charge as follows: "If the jury find that the defendant testified that he stood at the corner of Spruce and Acorn streets, then, as the indictment charges that he testified that he stood at the corner of Spruce and Sutton streets, there is a variance, and the defendant must be found not guilty." This request was refused, and the defendant's exception to the refusal was noted.

There was no error in this refusal. The variance relied on is not of such a character as to be vital to the issue involved. That the proof in a case of this sort must substantially support the indictment, and that any substantial variance in this respect will be fatal, is doubtless the law. But substantial 538 conformity is enough: 2 Wharton's Criminal Law, 8th ed., sec. 1313; 2

Chitty's Criminal Law, 312b; *Harris v. People*, 64 N. Y. 153, 154; 3 Greenleaf on Evidence, 16th ed., secs. 193, 194.

If the allegation as to the name of said streets, or either of them, was descriptive of the identity of that which was legally essential to the charge against the defendant, it could not be rejected, and would have to be proved strictly as laid; the well-settled rule of evidence being that no allegation which is descriptive of the identity of that which is legally essential to the charge can ever be rejected: *State v. Fitzpatrick*, 4 R. I. 269; *Starkie on Evidence*, 9th ed., *631. "Thus, in an indictment for stealing a black horse the animal is necessarily mentioned, but the color need not be stated; yet if it is stated it is made descriptive of the particular animal stolen, and a variance in the proof of the color is fatal. So in an indictment for stealing a bank note; though it would be sufficient to describe it generally as a bank note of such denomination or value, yet, if the name of the officer who signed it be also stated, it must be strictly proved. So also in an indictment for murder, malicious shooting, or other offense to the person, or for an offense against the habitation or goods, the name of the person who was the subject of the crime, and of the owner of the house or goods are material to be proved as alleged. But where the time, place, person, or other circumstances are not descriptive of the fact or degree of the crime, nor material to the jurisdiction, a discrepancy between the allegation and the proof is not a variance": 1 Greenleaf on Evidence, 16th ed., 829, 830, and cases cited.

The allegation in this indictment as to the names of the streets is not descriptive of the identity of the offense charged, and hence is not legally essential thereto. The vital question in the case was not whether the defendant and Di Nardo, in whose favor the defendant testified in the district court, stood in the particular place set out in the indictment, but whether the defendant swore falsely when he testified that Di Nardo remained in his company and did not go inside of the house where he, Di Nardo, was charged with having committed the offense for which he was tried in the district court.

539 The remaining exception taken by the defendant's counsel was based upon the ruling of the trial court in permitting several witnesses who did not understand the Italian language to testify as to what the defendant said in the district court, as there translated by the interpreter. We are of the opinion that this exception is well founded, and must be sustained.

While it is true that the interpretation of the words of a wit-

ness testifying in a foreign language by one who is sworn in court and translates the testimony to the tribunal is not obnoxious to the hearsay rule, because both the original witness and the interpreter are under oath and subject to cross-examination, yet where a witness is offered to testify to the statements of another person spoken in a language not understood by him, but translated for him by an interpreter, such witness is not qualified, because he does not speak from personal knowledge: 1 Greenleaf on Evidence, 16th ed., sec. 162p. All which he can know as to the testimony which is in fact given in such a case is from the interpretation thereof which is given by another person. In *People v. Ah Yute*, 56 Cal. 119, it was held that the testimony of the reporter based upon his notes was incompetent to prove the testimony of a witness given in a foreign language at a former trial and taken down by the reporter from the interpreter. The court said: "These statements were not spoken by the defendant in English. They were spoken in a foreign language and translated into the English language for the use of the court, the jury, and the reporter. In taking them down in shorthand the reporter received them from the lips of the interpreter and not from the defendant. It is, therefore, evident that the reporter did not understand the language in which the defendant spoke, and that he did not pretend to testify from his own knowledge or recollection of what the witness said, but from the shorthand notes of what the interpreter had said. The interpreter or some other witness who heard and understood the language in which the statements of the defendant were made should have been called to prove them. ⁵⁴⁰ The court therefore erred in overruling the objection of the defendant": See, also, *People v. Lee Fat*, 54 Cal. 527.

The only exception which we find to the rule as thus stated is that in those cases where the interpreter acts as the agent of the witness in translating his testimony it is held that what the interpreter said is admissible on the ground that the language of the interpreter in such a case is to be taken *prima facie*, at any rate, as the language of the witness who employs him and speaks through him: See *Camerlin v. Palmer Co.*, 10 Allen, 541, 542; *Commonwealth v. Vose*, 157 Mass. 393, 32 N. E. 355; *Scheerer v. Harber*, 36 Ind. 536; *Miller v. Lathrop*, 50 Minn. 91, 52 N. W. 274; 1 Greenleaf on Evidence, 16th ed., sec. 162p.

In the case at bar it appears that Raia was the official interpreter in the district court, and that he was not the defendant's agent. His interpretation of the defendant's testimony, there-

fore, was improperly admitted from those witnesses who were present in the district court and did not understand the Italian language. And while we cannot say that the evidence which was offered outside of this testimony was not sufficient to have warranted the jury in finding the defendant guilty, yet, as this was improperly admitted and might have influenced the jury, it is sufficient ground for the granting of a new trial.

From the conclusion to which we have thus arrived it becomes unnecessary to consider the alleged slight mistake made by Raia in his interpretation of the testimony.

Petition for new trial granted, and case remanded to the common pleas division for further proceedings.

Indictments for Perjury are discussed in the monographic note to *State v. Shupe*, 85 Am. Dec. 494-499. The indictment may recite the false testimony, but where a great mass of evidence is thrown in without pointing out in what answers to questions the alleged perjury is contained, the indictment is bad for uncertainty: *State v. Rowell*, 72 Vt. 28, 82 Am. St. Rep. 918, 47 Atl. 111. It is held that when an indictment is based upon a written instrument set out therein in *laec verba*, and the instrument offered in evidence bears a different date, the variance is material: *Dill v. People*, 19 Colo. 469, 41 Am. St. Rep. 254, 36 Pac. 229.

The Admissibility of Evidence Given at a former trial is considered in the monographic note to *Railroad Co. v. Osborn*, ante, pp. 192-208.

McDONALD v. BROWN.

[23 B. I. 546, 51 Atl. 213.]

A LIBEL Must be Deemed a Willful and Malicious Act, and injurious to the property of another within the meaning of the statutes of the United States, declaring what causes of action are released by a discharge in bankruptcy. (p. 662.)

LIBEL.—Liability for Libel is not Released by Discharge in Bankruptcy, because statutes of the United States exempt from the effect of such release all judgments in actions for willful and malicious injury to the person or property of another. (p. 663.)

JUDGMENT—Merger—Limitations Upon the Effect of.—A judgment upon a cause of action which is exempt from the operation of a discharge in bankruptcy is not, by operation of the law of merger, brought within the effect of the discharge. (p. 665.)

Scire facias against bail, to which defendant pleaded in bar a discharge in bankruptcy. A demurrer was interposed to this plea.

John J. Dockery, for the plaintiff.

Dexter B. Potter, for the defendant.

546 TILLINGHAST, J. This is a scire facias against bail. The writ sets out that by the consideration of the common pleas division of this court, on the twenty-fifth day of December, 1900, the plaintiff recovered judgment against Torrey E. Wardner for the sum of two hundred and fifty dollars and costs; and that, although execution has been issued on said judgment, it still remains unsatisfied, and the officer to whom the execution was directed has returned thereon that he could not find either the body or the estate of the said Torrey E. Wardner whereon to levy the same. Wherefore, he brings this action against the defendant, who became bail for the said Torrey E. Wardner on the original writ in the action aforesaid.

547 To this action the defendant files a plea in which he sets out that the plaintiff ought not to have his execution against him, because he says that the said Torrey E. Wardner, after the recovery of the judgment aforesaid and before the issuing of the writ in this case, to wit, on the nineteenth day of January, 1901, being bankrupt and insolvent, did file his petition for relief as a bankrupt in the district court of the United States for the district of Massachusetts, and was, on said nineteenth day of January, adjudged to be bankrupt and insolvent, and that he afterward entered into a composition with his creditors, which was duly accepted by a majority of those whose claims have been allowed, which composition, on the eleventh day of June, 1901, was duly confirmed by said United States district court. The plea also sets out that on said eleventh day of June said Torrey E. Wardner filed his petition for discharge from all provable debts existing at the time when his petition for relief was filed, of which said provable debts the judgment mentioned in said writ was one, and that a decree was thereupon duly entered in said United States district court discharging the said Torrey E. Wardner from all of his debts outstanding at the time of the filing of his petition for relief. Wherefore, the defendant in this case prays judgment if the plaintiff ought to have his execution against him, etc.

To this plea the plaintiff demurs, on the grounds (1) that the discharge in bankruptcy of the said Torrey E. Wardner does not release the defendant; and (2) that the debt upon which the present action is based is not one dischargeable in bankruptcy, because said debt is founded upon a judgment obtained in an

action of trespass on the case for libel, and was obtained before the said Wardner filed his petition in bankruptcy.

Chapter 3, section 17 of the United States bankruptcy law of 1898 provides that "a discharge in bankruptcy shall release a bankrupt from all of his provable debts except such as (1) are due as a tax levied by the United States, the state, county, district, or municipality in which he resides; (2) are judgments in actions for frauds, or obtaining property by false ⁵⁴⁸ pretenses or false representations, or for willful and malicious injuries to the person or property of another; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer, or in any fiduciary capacity."

The only question raised by the pleadings is whether the discharge in bankruptcy of said Torrey E. Wardner released him from the judgment debt above mentioned. The answer to this question, of course, depends entirely upon the construction which shall be put upon the language used in clause 2 of said section 17, viz.: "Or for willful and malicious injuries to the person or property of another."

If a judgment in an action for libel is a judgment based on willful and malicious injury to the person of another, then it is within the exception, and is not released by the discharge of the bankrupt.

A libel is both a public wrong and a private wrong. The remedy for the public wrong is by indictment or other criminal proceedings, while the remedy for the private wrong is by a civil action at common law, which is classed and known as a tort action.

One of the essential elements of every libel is malice. And no declaration which should fail to charge that the publication complained of was malicious would state a cause of action. Whether there was actual malice—that is, an evil intent or motive arising from spite or ill-will—in connection with the publication, or only the malice which exists by implication of law from the publication of the libelous matter, is immaterial in so far as the right of action is concerned. In short, if the act was done without legal excuse, it was in law a malicious act.

That the act of publishing a libel is a willful act, in the sense, at least, that it is an act of volition on the part of the publisher,

needs no argument. Every act is *prima facie* an act of volition, and must be regarded as such until the contrary ⁵⁴⁹ is shown. And such an act is more than a mere voluntary one, for it is coupled with a means of knowledge of the character of the act about to be performed and an intention to do it. Moreover, as said by the court in *Anderson v. How*, 116 N. Y. 342, 22 N. E. 697: "Willfulness is implied in maliciousness."

A libel, then, being a willful and malicious act, the only remaining question is whether it can be properly said to be an injury against the person of another so as to come within the meaning of the language in said section 17 of the bankrupt act. If the language "willful and malicious injuries to the person of another" means only physical injuries to his body, the case before us does not fall within that class. But if, on the other hand, said language is to be taken in its broad and general sense, and as commonly understood, it does include an injury caused by libel.

Wrongs are divisible into two classes—private wrongs and public wrongs. The former are an infringement of the private or civil rights belonging to individuals, considered as individuals, and are therefore generally termed civil injuries; while the latter are a breach and violation of public rights and duties, and are termed crimes and misdemeanors.

In *Cooley on Torts* (98) the learned author says: "A wrong is an invasion of right, to the damage of the party who suffers it. It consists in the injury done, and not commonly in the purpose or mental or physical capacity of the person or agent doing it. It may or may not have been done with bad motive; the question of motive is usually a question of aggravation only. Therefore, the law in giving redress has in view the case of a party injured and the extent of his injury, and makes what he suffers the measure of compensation."

"In its most usual sense," according to Mr. Blackstone (3 Blackstone's Commentaries, 158), "wrong signifies an injury committed to the person or property of another or to his relative rights unconnected with contract; and these wrongs are committed with or without force."

In view of these definitions, we think it is clear that a ⁵⁵⁰ libel is a wrong and injury committed against the person of another. As a part of the right of personal security, the preservation of every person's good name from the vile arts of detraction is justly included, and for a violation of this right ample remedies are provided.

The law, which is supposed to be good common sense crystallized, looks upon and treats a person's character as an inseparable part of the person himself. If that is injured, he is necessarily injured; if that is wronged, he is wronged. Indeed, it is frequently said, and with much truth, that "character makes the man." And in this connection we may say that it is difficult to conceive of a greater injury which could be done to a person than to wrongfully and maliciously tarnish or blacken and destroy his good character in the community where he lives. Wounded feelings, mental anguish, loss of social position and standing, personal mortification and dishonor, are clearly injuries that pertain to the person. In so far as we are aware, injuries to the character are always classed in the law with injuries to the person.

Under the Code of Civil Procedure of the state of New York, libel and slander are included in injuries to the person: See *Colwell v. Tinker*, 65 App. Div. 20, 72 N. Y. Supp. 506.

The policy of the bankrupt law is not to relieve an insolvent debtor from liabilities arising out of his fraud or other wrongdoing, but to relieve him from his debts and obligations which were honestly contracted and incurred, but which, because of misfortune of some sort, he has become unable to meet. To hold otherwise, as it seems to us, would be to make the law an instrument of wrong and oppression. Where, therefore, as in the case before us, a judgment has been obtained on a right growing out of willful and malicious injury to the person of the plaintiff, the discharge of the debtor in bankruptcy does not, in our opinion, have the effect to relieve him from such judgment.

While no case has been cited by counsel, nor have we been able to find any, in which the particular question here raised was involved, we have found several which are closely analogous ⁵⁵¹ and which strongly confirm us in the view which we have taken of the statute aforesaid. We will refer to a few of them.

Disler v. McCauley, 35 Misc. Rep. 411, 71 N. Y. Supp. 949, decided in July, 1901, was a case for breach of promise of marriage in which seduction and the birth of a child were proved. The defendant, after judgment against him, went into bankruptcy and obtained his discharge. He then filed a motion for the canceling and discharge of the judgment.

Dickey, J., in denying the motion, said: "While in form and in name this action was one for breach of promise to marry, the complainant properly included an allegation of seduction under promise of marriage. Proof was given of the seduction and

birth of a child, and damages were given in the sum of three thousand dollars. It may fairly be assumed that at least a part of these damages included in the judgment herein grew out of, and were given because of, the injury to the person covered by the seduction part of the complaint. This being so, can it be said that the judgment and no part of it is one for willful injury to the person? To my mind, Congress never intended to discharge bankrupts from liability for damages such as are included in this judgment. The purpose of the bankrupt act was to relieve failing honest debtors from their money obligations, and not to free tortious debtors from liability for their wrongs. . . . The spirit of the bankruptcy law is to govern. This bankruptcy proceeding was evidently taken to discharge this very judgment, because the bankrupt owed practically nothing besides. There would be little use in bringing actions of this character if the judgment obtained might be speedily discharged by going through the form of bankruptcy proceedings. This should not be encouraged."

In the case of *In re Freche*, 109 Fed. 620, decided in June, 1901, it was held that a judgment recovered in a court of New Jersey for seduction of the plaintiff's minor daughter, which must be based on loss of services, but also includes damages for personal injuries to the plaintiff through being subjected to mental anguish, disgrace, etc., is one for a "willful ⁵⁵² and malicious injury to the person or property of another" within the meaning of the bankruptcy act of 1898, and is not released by a discharge of the defendant in bankruptcy. Kirkpatrick, J., in delivering the opinion of the court, said: "Until the daughter attains the age of twenty-one years, this right to her services is a property right which the father is entitled to enjoy without molestation; and any unlawful act which hinders him from availing himself of the benefits of this right or making such disposition of it as he sees fit is an interference for which he is entitled to recover damages, as for an injury to his property. But, as was said by Jackson, J., in *Barbour v. Stephenson*, 32 Fed. 66, 'the plaintiff goes through the form of showing that he was entitled to the daughter's services in order to reach the higher plane of wrong and injury for which he was entitled to compensation.' Therefore, upon the foundation of loss of services, there has been built up a right of the parent to recover in such actions damages for the personal injuries inflicted upon him by the act of seduction, and to receive compensation for being thereby subjected to mental anguish,

anxiety, permanent sorrow, dishonor and disgrace. The jury is entitled to consider all these injuries in assessing the plaintiff's damages. In this respect the injury is to the person of the plaintiff, and the damages recovered are analogous to those in an action of slander or libel. . . . The act was unlawful, wrongful, and tortious, and, being willfully done, it was in law malicious. . . . 'Malice,' in law, simply means a depraved inclination on the part of a person to disregard the rights of others, which intent is manifested by his injurious acts. . . . I am of the opinion that the discharge of the bankrupt does not release him from the judgment obtained by Charles T. Combs, for the nonpayment of which Freche is in custody, because the same is a judgment for willful and malicious injuries to the person or property of another and as such excepted by subsection 2 of section 17 of the bankruptcy act." To the same effect is *In re Meples*, 105 Fed. 919. See, also, *In re Hirschman*, 104 Fed. 69, 4 Am. Bankr. Rep. 715.

⁵⁵³ That the cause of action in the case is not so far merged in the judgment as to prevent its being shown, where the defendant claims that he is discharged therefrom in bankruptcy, see *Young v. Grau*, 14 R. I. 340.

Most of the cases relied on by defendant's counsel in support of the demurrer are cases under the bankruptcy law of 1867, which was materially different from the present law in regard to the matter here involved, and hence they are not controlling.

Demurrer sustained, and case remanded for further proceedings.

An Action for a Libel or Slander is an action for a personal injury, the effect of the wrong on the estate of the injured person being merely incidental: *Noonan v. Orton*, 34 Wis. 259, 17 Am. Rep. 441. In this case it is held that a right of action for malicious abuse of process does not pass to the assignee in bankruptcy. A transfer of property pending an action of slander, with an intent to defeat any judgment that may be recovered therein, is fraudulent: *Chalmers v. Sheehy*, 132 Cal. 459, 84 Am. St. Rep. 62, 64 Pac. 709.

CASES
IN THE
SUPREME COURT
OF
SOUTH DAKOTA.

STATE v. CADDY.

[15 S. Dak. 167, 87 N. W. 927.]

FORMER JEOPARDY.—An Acquittal of an Assault with a deadly weapon, with an intent to rob, is not a bar to a prosecution for robbery, the two offenses being a part of one transaction. (pp. 670-671.)

WITNESS.—If the Impeachment of a prosecuting witness is attempted by showing contradictory statements out of court, the state may show that prior to such statements he made others consistent with his testimony at the trial. (pp. 672-674.)

Frawley & Laffey, for the plaintiff in error.

John L. Pyle, attorney general, S. C. Polly, state's attorney, and W. G. Rice, for the state.

¹⁶⁷ **CORSON, J.** At the February term, 1900, of the circuit court of Lawrence county, the defendant was indicted for the crime of robbery. The indictment charges that the plaintiff in error and one Thomas Carberry, on the 29th of October, 1899, did unlawfully, wrongfully, and feloniously take and carry away from the person of Michael R. Russell the sum of five dollars, and that said taking was accomplished by means of force and putting the said Russell in fear of an immediate and unlawful injury to his person. To this indictment the defendant entered the plea of not guilty, and also pleaded that he had been acquitted upon the trial of an indictment charging ¹⁶⁸ him with an assault with intent to commit a felony, other than an assault with intent to kill, and adding thereto the usual allegations that the parties named

in the two indictments were the same, and that the transaction upon which the second indictment was based was the same identical transaction as the one upon which the former indictment was based, and that the proof to sustain the indictment to which the plea was interposed would be identically the same as that given in support of the former indictment. To this plea of former acquittal the state interposed a demurrer, except to the portion of the plea alleging that the evidence would be the same, which allegation was denied. The court sustained the demurrer, and the plaintiff in error was thereupon tried upon the indictment for robbery and convicted, and has brought the case to this court by writ of error.

The principal question presented to this court for review is as to the rulings of the court in sustaining the demurrer to the plea of former acquittal. The indictment under which the plaintiff in error was tried and convicted was based upon section 6481 of the Compiled Laws, which reads as follows: "Robbery is a wrongful taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." The indictment under which he was tried and acquitted was based upon section 6491 of the Compiled Laws, which reads as follows: "Every person who shoots or attempts to shoot at another with any kind of firearm, airgun, or other means whatever, or commits any assault or battery upon another by means of any deadly weapon, or by such other means or force as was likely to produce death, with intent to commit a felony other than assault with intent to kill, or in resisting the execution of any legal process, is punishable by imprisonment in the state prison not exceeding ten years." It is contended on the part of the plaintiff in error that, having been acquitted ¹⁸⁹ of the offense charged in the former indictment, he could not, under the constitution of this state, again be tried upon the second indictment, and that the court therefore erred in sustaining the demurrer of the state to his plea in bar. Section 9, article 6, of the constitution of this state reads as follows: "No person shall be compelled, in any criminal case, to give evidence against himself or to be twice put in jeopardy for the same offense." A similar provision is found in all, or nearly all, of the constitutions of the several states, and the decisions construing the same are very numerous and somewhat conflicting, and we shall not attempt to review them in this opinion. The rule applicable to this class

of cases, in our opinion, is clearly stated by Gray, J., speaking for the supreme court of Massachusetts, in *Morey v. Commonwealth*, 108 Mass. 433. He says: "A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes, and, if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." In *People v. Bentley*, 77 Cal. 7, 11 Am. St. Rep. 225, 18 Pac. 799, the defendant was tried and convicted of an assault with a deadly weapon under an information charging him with an assault with intent to commit murder. He was afterward indicted for an attempt to commit robbery, and upon that indictment he sought to prove that he had been convicted of the former offense, as a bar to the action, but the trial court excluded this evidence. It seemed to have been assumed in the opinion of the appellate ¹⁷⁰ court that the parties were the same, and that the acts constituting the two offenses were substantially the same, and were sustained by substantially the same evidence, but the ruling of the court below was sustained by the supreme court. In the opinion the court says: "The evidence offered tended to show that he had been convicted of an assault with a deadly weapon under an information charging an assault with intent to commit murder. It is plain that the defendant had not formerly been convicted of an offense for which he could have been or was tried and convicted on the information charging the offense of which he here stands convicted. 'It is believed that no well-considered case can be found where a putting in jeopardy for one act, or a conviction for one act, was held to bar a prosecution for another separate and distinct one, merely because they were so closely connected in point of time that it is impossible to separate the evidence relating to them': *Teat v. State*, 53 Miss. 456, 24 Am. Rep. 708. According to the testimony in this case, the first thing done by the defendant and his confederate was an attempt to intimidate and rob. The next was an attack with a deadly weapon. It cannot be law that a man having assaulted an-

other with a deadly weapon, and having also attempted before that to rob can escape punishment for the attempt to rob because of a conviction for assault with a deadly weapon. If the offenses do not possess the same elements, although both relate to the same transaction, it would seem that both may be punished. This view of the law seems to have been taken by the supreme court of this state in the case of *People v. Majors*, 65 Cal. 138, 52 Am. Rep. 295, 3 Pac. 597, where many authorities bearing upon the matter in hand are cited and discussed. The offense of which the defendant was first convicted was an effort to injure the person of the prosecutor with a deadly weapon. That of which he was last convicted was an attempt ¹⁷¹ to take away the goods of the prosecutor from his person by intimidation or violence. The essential elements of the two offenses are not the same." In *State v. Elder*, 65 Ind. 282, 32 Am. Rep. 69, the supreme court of that state, in discussing the question we are now considering, says: "The English rule is that, when the facts necessary to convict upon the second prosecution would necessarily have convicted on the first, a final judgment on the first prosecution will be a bar to the second; but if the facts which will convict on the second prosecution would not necessarily have convicted on the first, then the first will not be a bar to the second, although the offenses charged may have been committed by the same state of facts; and we believe this rule is valid in all the states of the Union." The court in its opinion further says: "But when the same facts constitute two or more offenses, wherein the lesser offense is not necessarily involved in the greater, and when the facts necessary to convict on the second prosecution would not necessarily have convicted on the first, then the first prosecution will not be a bar to the second, although the offenses were both committed at the same time and by the same act." This is cited with approval by the supreme court of California in the case of *People v. Majors*, 65 Cal. 138, 52 Am. Rep. 295, 3 Pac. 597. In the case of *Commonwealth v. Roby*, 12 Pick. 496, Shaw, C. J., says: "It must therefore appear to depend upon the facts so combined and charged as to constitute the same legal offense or crime. It is obvious, therefore, that there may be a great similarity in the facts where there is a substantial legal difference in the nature of the crimes; and, on the contrary, there may be considerable diversity of circumstances where the legal character of the offense is the same—as where most of the facts are iden-

tical, but by adding, withdrawing, or changing some one fact the nature of the crime is changed; as where one burglary is charged as a burglarious breaking and stealing of certain goods, ¹⁷² and another is a burglarious breaking with intent to steal. These are distinct offenses: *Rex v. Vandercomb*, 2 Leach, 708. So, on the other hand, where there is a diversity of circumstances, such as time and place, where the time and place are not necessary ingredients in the crime, still the offenses are to be regarded as the same. In considering the identity of the offense, it must appear by the plea that the offense charged in both cases was the same in law and in fact. The plea will be vicious if the offenses charged in the two indictments be perfectly distinct in point of law, however nearly they may be connected in fact." Further along in the opinion the learned judge says: "Unless the first of the two indictments was such as the prisoner might have been convicted upon by proof of the facts contained in the second, an acquittal or conviction on the first can be no bar to the second." As bearing upon this subject, see *State v. Stewart*, 11 Or. 52, 238, 4 Pac. 128; *State v. Gapen*, 17 Ind. App. 524, 45 N. E. 678; *Hilands v. Commonwealth*, 111 Pa. St. 1, 56 Am. Rep. 235, 6 Atl. 267; *State v. Magone*, 33 Or. 570, 56 Pac. 648; *State v. Reiff*, 14 Wash. 664, 45 Pac. 318; *State v. Gustin*, 152 Mo. 108, 53 S. W. 421; *Taylor v. State*, 41 Tex. Cr. Rep. 564, 55 S. W. 961; *Ford v. State (Tex.)*, 56 S. W. 918; *Wallace v. State*, 41 Fla. 547, 26 South. 713; *Burks v. State*, 24 Tex. App. 326, 6 S. W. 300; *Teat v. State*, 53 Miss. 439, 24 Am. Rep. 708; *Comp. Laws*, secs. 7308-7311.

It will be observed in the case at bar that the two indictments are based upon two distinct and independent statutes, and that the offenses charged are of an essentially different character. In the indictment upon which the plaintiff in error was convicted he is charged with the crime of robbery, in taking from the person of Michael R. Russell, in his immediate presence and against his will, by means of force and fear, a certain sum of money. No assault is charged in the indictment, nor was it essential to prove an assault with a deadly weapon in order to secure the conviction of the accused. In the ¹⁷³ former indictment, upon the trial of which he was acquitted, he is charged with assault and battery committed upon the person of Michael R. Russell by means of a deadly weapon, with intent to rob him. It is quite certain under that indictment the plaintiff in error could not have been convicted

of the crime of robbery. It is strenuously contended on the part of the plaintiff in error that the offense of an assault with intent to rob is necessarily included in the indictment for robbery, and that had he been properly tried under that indictment he might have been acquitted of the crime of robbery, but convicted of an assault with intent to rob, under the provisions of section 7429 of the Compiled Laws, which reads as follows: "The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment, or with an attempt to commit the attempt [offense]." But we are of the opinion that this view cannot be sustained, for, as before stated, no assault is charged in the indictment, and none seems to be necessary to constitute the offense. But in the indictment for an assault with intent to commit felony, it is essential that the assault not only be alleged, but it must be alleged as having been committed by the use of a deadly weapon, or by means likely to produce death, or the assault must have been made while resisting the execution of legal process. It will be seen that the offenses charged in the two indictments we are considering not only arose under different statutes, but that each statute requires proof of an additional fact which the other does not. Under the former indictment proof of an assault with a dangerous weapon, or by means likely to produce death, or that the assault was made while resisting the execution of legal process, was essential and necessary in order to convict the defendant, but it was not necessary to prove that he actually committed the offense of robbery, while in the indictment under ¹⁷⁴ which he was convicted it was essential to allege and necessary to prove that he actually committed the offense of robbery by taking something of value from the person or in the presence of the party against his will, accomplished by means of force or fear. In other words, as said by the court in *People v. Bently*, 77 Cal. 7, 11 Am. St. Rep. 225, 18 Pac. 799, one statute provides punishment for an assault upon the person, and the other for taking personal property wrongfully from the person or from his immediate presence. It is scarcely necessary to state that for the purpose of this plea it is immaterial whether the plaintiff in error was acquitted or convicted under the former indictment, as the same rule applies to either case Comp. Law, sec. 7310. After a careful examination of this question, we are of the opinion that the court was clearly right in sustaining

the demurrer of the state to the plea of the plaintiff in error interposed in this case.

The record presents another important question for our decision. On the trial Michael R. Russell, the prosecuting witness, was asked on cross-examination if he had not stated after the alleged robbery, to certain persons named in the question, that he could not identify the persons who committed the robbery; and he partially admitted that he had done so, stating his reasons therefor. The accused thereupon introduced witnesses who testified that said Russell had made contradictory statements out of court, as to which he had been interrogated. The state, in rebuttal, over the objection of counsel for defendant, proved by said Russell and other persons that prior to the declarations made by him called out by his cross-examination, he had stated that he did recognize the persons charged with the robbery as the parties who committed the same. The evidence tended to prove that these declarations of the witness made in corroboration of the testimony given by him on the trial were made on the morning or the forenoon of the alleged robbery, and prior to ¹⁷⁵ the statements called out on the cross-examination. The plaintiff in error contends that the admission of the evidence of the prosecuting witness on his re-examination by the state, and the evidence given by the witnesses called by the state to prove the making of such statements, constitute error for which he is entitled to a new trial. It is undoubtedly true that this evidence could not have properly been admitted had it been offered by the state in making out its case in chief, but an exception seems to have been recognized and such evidence admitted when it is offered in rebuttal of evidence called out on cross-examination, tending to prove that a witness has made statements out of court contradicting those made by him on the trial. The authorities are not in harmony upon this question, the courts of some states holding that such evidence is admissible, while in others the contrary doctrine prevails. The courts of Tennessee, Indiana, Maryland, Massachusetts, Pennsylvania, and the supreme court of the United States hold such evidence admissible: *Glass v. Bennett*, 89 Tenn. 481, 14 S. W. 1085; *Commonwealth v. Wilson*, 1 Gray, 337; *Commonwealth v. Jenkins*, 10 Gray, 485; *Thompson v. State*, 38 Ind. 39; *Coffin v. Anderson*, 4 Blackf. 398; *Cooke v. Curtis*, 6 Har. & J. 93; *Parker v. Gonsalus*, 1 Serg. & R. 536; *Henderson v. Jones*, 10 Serg. & R. 322, 13 Am. Dec. 676; *Conrad v.*

Griffy, 11 How. 480. In discussing this question the supreme court of Tennessee, in *Glass v. Bennett*, 89 Tenn. 481, 14 S. W. 1085, lays down the rule as follows: "The rule is that when it is attempted to be established that the statement of a witness on oath is a recent fabrication, or when it is sought to destroy the credit of the witness by proof of contradictory representations, evidence of his having given the same account of the matter at a time when no motive existed to misrepresent the facts ought to be received, because it naturally tends to inspire confidence in the sworn ¹⁷⁶ statement": *Hayes v. Cheatham*, 6 Lea, 10. In *Conrad v. Griffy*, 11 How. 480, the supreme court of the United States, after reviewing the authorities, uses the following language: "In this court it has been held that such evidence is not admissible if the statements were made subsequent to the contradictions proved on the other side: *Ellicott v. Pearl*, 10 Pet. 412, 438. So far as regards principle, one proper test of the admissibility of such statements is that they must be made at least under circumstances when no moral influence existed to color or misrepresent them: 1 *Greenleaf on Evidence*, sec. 469; 2 *Pothier on the Law of Obligations or Contracts*, 289; 1 *Starkie on Evidence*, 148; 1 *Phillips on Evidence*, 308. But when they are made subsequent to other statements of a different character as here, it is possible, if not probable, that the inducement to make them is for the very purpose of counteracting those first uttered: *Ellicott v. Pearl*, 10 Pet. 440. This impairs their force and credibility, when, if made before the others, they might tend to sustain the subsequent evidence corresponding with them: *Robb v. Hackley*, 23 Wend. 52; 2 *Phillips on Evidence*, 446; 1 *Greenleaf on Evidence*, sec. 469." The same qualification is made by the supreme court of Maryland, and we think it a proper qualification in this class of cases. It seems to us proper that, when it is sought to impeach the testimony of a witness by showing that he has made contradictory statements out of court, the party calling such witness should have the right to show that very recently after the transaction, and before such contradictory statements were made, he made statements as to the transaction consistent with the evidence given by him on the trial. The evidence introduced in this case on the part of the state comes clearly within this rule, and we are of the opinion that the court committed no error in admitting it.

The judgment of the court below is affirmed.

A *Conviction* of an assault and battery, under an information charging an assault with intent to murder, is not a bar to a prosecution for an attempt to commit robbery, although both offenses relate to the same transaction: *People v. Bentley*, 77 Cal. 7, 11 Am. St. Rep. 225, 18 Pac. 799. Compare *Wilcox v. State*, 6 Lea, 571, 40 Am. Rep. 53; and see *State v. Williams*, 152 Mo. 115, 75 Am. St. Rep. 441, 53 S. W. 424; *State v. Watson*, 20 R. I. 354, 78 Am. St. Rep. 871, 30 Atl. 193; *Stewart v. State*, 35 Tex. Cr. Rep. 174, 60 Am. St. Rep. 35, 32 S. W. 766; *State v. Fourcade*, 45 La. Ann. 717, 40 Am. St. Rep. 249, 30 South. 187; *State v. Rosenbaum*, 23 Ind. App. 236, 77 Am. St. Rep. 432, 55 N. E. 110.

CHAMBERLAIN v. WOOD.

[15 S. Dak. 216, 88 N. W. 109.]

CONSTITUTIONAL LAW.—The Right of Suffrage is not a natural or civil right, but a privilege conferred upon the person by the constitution and the laws of the state. (p. 677.)

CONSTITUTIONAL LAW.—Presumptively a Statute is Valid, unless clearly in conflict with the constitution. (p. 677.)

CONSTITUTIONAL LAW.—The Legislature, just as completely as a constitutional convention, represents the will of the people in all matters left open by the constitution. (p. 678.)

CONSTITUTIONAL LAW.—Restricting Right to Vote.—The legislature may, by requiring the names of all candidates for office to be printed upon the official ballot, deny the right of voters to write on their ballots the names of candidates not printed there. (p. 681.)

S. H. Cranmer, for the appellant.

No brief filed or appearance made for the respondent.

218 **CORSON, J.** This is an appeal from an order sustaining a demurrer to plaintiff's complaint. The appeal has been dismissed as to the defendants George D. Wood and F. C. Hedger, leaving the defendant E. H. Alley the only respondent. The action was brought by the plaintiff to recover of the defendants damages for unlawfully depriving him of the office of county commissioner of Brown county. It is alleged in the complaint that in 1895-96 the defendants Wood and Alley were members of the board of county commissioners of Brown county, and that the defendant Hedger was acting county auditor of said county; that the defendant constituted the board of canvassers of said county; that in November, 1895, an election was held in the various voting precincts within the first commissioner district in said county for the

purpose of electing a county commissioner for said district for the term commencing January, 1896; that no certificate of any person as a candidate for the office of county commissioner of said county was filed in the office of the county auditor of said county twenty days prior to the election; that at said election the qualified electors of said first commissioner district of said county cast their ballots for this plaintiff and others for the said office of county commissioner by writing upon the official ballot used at said election the following words and characters, to wit, "For county commissioner for first commissioner district," followed by the name of the candidate or the person for whom such elector ²¹⁹ desired to vote, and by making a cross at the left of the name of such person so written upon said ballots. The complaint then proceeds to allege that the said board refused to canvass the said vote so cast for commissioner for the first district, and that by reason thereof the plaintiff was deprived of the office to which he claimed to have been elected, and that he suffered damages thereby to the amount of five hundred and sixty-four dollars, and demanded judgment against said defendants for the said amount. To this complaint the defendants interposed a demurrer on the ground that the said complaint did not state facts sufficient to constitute a cause of action. The demurrer was sustained by the trial court, and hence this appeal.

It will be observed that the complaint distinctly states that no certificate of nomination of the plaintiff for the office of county commissioner was filed in the office of the county auditor within the time prescribed by law, and that the method of voting for said plaintiff as county commissioner was by writing his name upon the official ballots used at said election, and by making a cross at the left of his name upon the said ballots. While the trial court has not stated the ground upon which the demurrer was sustained, it seems to be assumed by the appellant, and we may presume that it was made upon the ground that as no certificate of the nomination of the appellant was filed in the office of the county auditor twenty days before the election, and, as his name was not printed on the official ballot, he was not legally a candidate, and that the votes cast for him by writing the description of the office, his name thereunder, and a cross at the left thereof, was not a compliance with the statute, and he was not, therefore, legally elected to the office. It is contended on the part of the appellant that, notwithstanding no certificate of election was filed

as required by law, the voters of that district had the legal right to write the designation of the office and the plaintiff's name thereunder ²²⁰ upon the official ballot, and that he, having received a majority of the votes so cast at said election, was legally entitled to the office, and that by reason of the failure of the defendants to properly canvass the votes so cast for the plaintiff, he is entitled to recover the damages he sustained thereby. An important question is therefore presented for the determination of this court—namely, Can a person be voted for and elected to an office under the laws of this state, who has not filed a certificate of his nomination in the proper office within the time prescribed by law, and whose name is not printed as a candidate upon the official ballots? Under what is known as the "Australian ballot law," enacted by the legislature of this state, and in force at the time of the election set out in the complaint, it is provided that an official ballot shall be printed at the expense of the county, upon which the names of all candidates for office, who have properly filed certificates of nomination, shall be printed, and the elector is authorized to indicate his choice for such candidate as he may desire to vote for by making a cross at the head of the party ticket or at the left of the name of the candidate for whom he desires to vote. No provision is made in the law, as it stood in 1895, for writing the name of any person upon the ballot. This court has held in a number of cases, beginning with *Vallier v. Brakke*, 7 S. Dak. 343, 64 N. W. 180, that the writing of a name upon the official ballot invalidated the same. In *Parmley v. Healey*, 7 S. Dak. 401, 64 N. W. 186, this court, speaking by Mr. Justice Fuller, says: "And, moreover, the writing of a name upon a ticket identifies the voter, and invalidates the entire ballot, and subjects the one who places it there to a criminal prosecution." The appellant contends, however, that under the constitution of this state an elector has the right at any election to vote for any person for an office he may desire, and that the act of the legislature, if it is to be so construed as to deprive ²²¹ the elector of the right to write the name of the candidate for whom he desires to vote upon the official ballot, is unconstitutional. The right of suffrage is not a natural or civil right, but a privilege conferred upon the person by the constitution and the laws of the state. Judge Cooley, in his work on Constitutional Limitations, says: "Participation in the elective franchise is a privilege, rather than a right, and it is

granted or denied upon grounds of general policy": Cooley's *Constitutional Limitations*, 6th ed., 752. In *People v. Barber*, 48 Hun, 198, the supreme court of New York says: "The elective suffrage is not a natural right of the citizen. It is a franchise dependent upon the law by which it must be conferred to permit its exercise. . . . It is a political right, to be given or withheld at the pleasure of the law-making power of the sovereignty": 10 Am. & Eng. Ency. of Law, 2d ed., 568. The question, therefore, as to what right an elector has in this state, must be determined by an examination of its constitution and laws. It is scarcely necessary to repeat what has been frequently said by this court, that, presumptively, the law enacted by the legislature is valid, and it must be so held unless it is clearly in conflict with or repugnant to some express provision of the constitution, or the legislature has been expressly inhibited by the constitution from enacting the same. Mr. Cooley, in his work above stated, in speaking of this question, says: "The rule upon this subject appears to be that, except where the constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not in any particular case. . . . The judiciary can only arrest the execution of the statute when it conflicts with the constitution. . . . Any legislative act which does not encroach upon the powers apportioned to the other departments of the government being *prima facie* valid must be enforced, unless restrictions upon the legislative authority ²²² can be pointed out in the constitution, and the case shown to come within them": Cooley's *Constitutional Limitations*, 201, 202.

With these preliminary observations, we will examine the provisions of the constitution of this state that bear upon the question of the right of suffrage. Section 19, article 6, of the constitution provides: "Elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Under these provisions the elector cannot legally be physically restrained in the exercise of his right by either civil or military authority; nor can there be inequality, and every voter shall have the same right as every other voter. Certainly, under the laws we are considering, all electors are vested with the same rights—namely, the rights of appearing at an election and voting in the manner prescribed by law. Section 1, article 7, provides what shall constitute the qualifications of an elector, and one

possessing these qualifications, it is declared, "shall be deemed a qualified elector at such election." It will be noticed that in neither of these sections is it provided when, how, where, or under what conditions the elector shall exercise the right of suffrage. The framers of the constitution seem to have designedly left the right of suffrage at this point to be regulated and governed by such laws as the legislature might deem proper to enact. The constitutional convention and the legislature are equally the representatives of the people, and the written constitution marks only the degree of restraint which, to promote stable government, the people impose upon themselves; but whatever the people have not, by their constitution, restrained themselves from doing, they, through their representatives in the legislature, may do. The legislature, just as completely as a constitutional convention, represents the will of the people in all matters left open by the constitution: *Commonwealth v. Reeder*, 171 Pa. St. 505, 33 Atl. 67. ²²³ Unless, therefore, the legislature is inhibited from enacting the law we are considering, it is as much the will of the people as though expressed in the constitution. Let us ask, therefore, what provision is there in the constitution inhibiting the law-making power from providing when, how, and under what regulations and conditions the elector may exercise the right of suffrage. The constitution has not, as we have seen, prescribed any conditions or rules governing the exercise of the right; nor has it inhibited the legislature from prescribing such rules, regulations, and conditions as it might deem proper and for the public interests. The law-making power has taken the elector at the point where the constitution has left him, and has provided when, in what manner, and under what restrictions he may exercise the right of suffrage, and in so doing has provided: 1. That he must exercise that right by using an official ballot; 2. That he must designate in the manner specified his choice of candidates whose names are upon the official ballot, and whose names can only be placed there by a compliance with the law; 3. It has, in effect, denied to the elector the right to write the name of a candidate for whom he desires to vote upon the official ballot, or otherwise deface the same, by declaring that "no elector shall place any mark upon his ballot by which it may afterward be identified as the one voted by him." The law, in form, applies equally to all electors without discrimination, and one elector, therefore, possesses all of the rights, and no more, of every other elector. The legis-

lature, therefore, having in effect limited the right of the elector to voting for candidates whose names are printed on the official ballots, he can only exercise the right in the manner prescribed. But the elector is not thereby necessarily deprived of the right of suffrage, as he has the same right as any other elector to secure the printing of the name of his candidate ²²⁴ upon the official ballot in the manner prescribed by law—namely, by nomination of some political party, or by securing the signatures of twenty electors, in the case of a county office, to a certificate. This may occasion the elector some inconvenience and labor, but these constitute no objection to the law. In fact, the law requires many acts to be done by the elector not required under former laws, but these requirements have been generally held to be constitutional. We see no reason why the law as laid down by the courts in regard to those requirements should not be applicable to this case.

The supreme court of Pennsylvania, in *Commonwealth v. Reeder*, 171 Pa. St. 505, 33 Atl. 67, has recently decided an important constitutional question very much in point in the case at bar. A law was enacted by the legislature of that state for the election of seven judges of the superior court, which provided that no elector should be permitted to vote for any number exceeding six of the judges to be so elected. It was contended by certain electors that this act was unconstitutional, in that it deprived the electors of the right given them by the constitution to vote for the entire seven judges. But the court held against this contention, and that the law was constitutional. The court in a very able opinion discussed the constitutional question at length, and in the course of the opinion, in speaking of the will of the people as expressed in the act of the legislature, says: "We peruse the expression of their will in the statute, then examine the constitution, and ascertain if this instrument says 'Thou shalt not,' and, if we find no inhibition, then the statute is the law simply because it is the will of the people, and not because it is wise or unwise." In speaking of one possessed of all the qualifications of an elector, the court says: "Then he is an elector, and entitled to vote as the law may prescribe. Being an elector, and therefore entitled to vote at all elections, the constitution of 1874, as well as those which preceded, goes a step ²²⁵ further, and in section 5, article 1, declares: 'All elections shall be free and equal'; that is, the voter shall not be physically restrained in the exercise of his right by either civil or military authority.

Nor shall there be inequality. Every voter shall have the same right as every other voter." And the court further on in the opinion says: "Can they [constitutional provisions], by any reasonable interpretation, include an absolute right to vote for every candidate of the group of candidates for the same office? The question now is as to the interpretation to be put upon the language specifying the qualifications of the voter who has by law a right to vote at the election for the candidates for this office. No sound reason has been urged in the argument why we should enlarge the scope of the words 'shall be entitled to vote at all elections' by practically adding, 'also for every candidate of a group of candidates for the same office.' The constitution does not so say and has never been interpreted to so mean." It will be seen that the court in this case goes much further than we are required to go in the case at bar. There the elector was limited by the law to voting for six candidates out of the seven, and it was conceded that, if limited to six, he might be limited to a less number; and the court sustained the act of the legislature, for the reason that it was not inhibited by the constitution from enacting the same. In the case at bar, as we have seen, no elector is deprived of his right to vote for the candidate of his choice, but, in order to exercise the right, he must see that the name of his candidate is upon the official ballot. We do not feel called upon to give the constitution of this state a forced or strained construction in order to defeat a law so beneficial to the people of this state, and so well calculated to prevent fraud, bribery, and corruption at our elections. To construe the constitution as giving the right to the elector to write upon the official ballot the name of any candidate, and to deny to the legislature ²²⁶ the right to prescribe upon what conditions the elector may exercise the right of suffrage, would in effect, destroy the more important features of our election law in securing the purity of elections and preventing the fraud, bribery, and corruption at elections existing under the former system; for, if the elector may write the name of a candidate upon the official ballot, this necessarily would constitute a "distinguishing mark" and eliminate from our system the secrecy intended, and thereby enable bribery at elections to be carried on with safety. A candidate desiring to purchase a number of votes could easily arrange with the voters, as proof that they had complied with the contract on their part, to write on the official ballot the name of John Jones, or any other person agreed

upon for the purpose, for some minor office. An examination of the ballots would at once show whether or not the voters had carried out their contract. Again, one of the most important features of the election law is the one requiring the names of all candidates to be certified as required by law, and printed upon the official ballot, thus enabling the public to investigate the moral character and qualifications of the candidate for the office to which he aspires, and enable the voters to use such efforts as may be necessary to defeat a dishonest or incompetent candidate. Upon a careful consideration of the question, we are clearly of the opinion that the constitution has not inhibited the legislature from requiring the names of all candidates for office in this state to be printed upon the official ballot, and, in effect, denying to electors the right of writing upon the official ballot the name of any candidate.

The right claimed is, for all practical purposes, a mere theoretical or abstract right. This is apparent from the fact that, though the election law of this state has been in effect for more than ten years, this is the first case, so far as the records of this ²²⁷ court disclose, in which the right has been claimed; and in this case it appears from the record that the plaintiff had obtained the proper certificate, but through some inadvertence it was filed with the auditor one day too late, hence his name was omitted as a candidate from the official ballot. We have not overlooked the cases of *Sanner v. Patton*, 155 Ill. 553, 40 N. E. 290, *People v. Shaw*, 133 N. Y. 493, 31 N. E. 512, *Bowers v. Smith* (Mo.), 17 S. W. 761, and *State v. Dillon*, 32 Fla. 545, 14 South. 383, cited by counsel for appellant in support of his contention. But in neither of these cases, except the one cited from Florida, was the constitutional question we have been considering involved, and the only question before the court in each of those cases was whether or not the law under consideration authorized the writing of the name of the candidate upon the official ballot. The comments of the judges, therefore, upon the constitutionality of the law, were dicta, simply, and not binding upon the court in which the decisions were rendered, and are entitled to very little weight in this court. In the Florida case the supreme court of Florida seems to have held that part of the law we are considering unconstitutional, but the decision of that question does not appear to have been required in that case.

We do not deem it necessary to consider on this appeal the question as to the liability of the defendants to respond in dam-

ages, assuming that the plaintiff had been legally elected, and therefore express no opinion upon that question. It is clear, however, that had the proof entitled him to recover, he must, in any event, show that he was legally elected. Having failed to do this, the complaint fails to state any cause of action, and the demurrer was properly sustained, and the order sustaining the same must be affirmed.

The decision of this court in the mandamus proceedings between ²²⁵ the same parties, reported in *Chamberlain v. Hedger*, 12 S. Dak. 135, 80 N. W. 178, does not in any manner affect the case at bar.

The order of the circuit court appealed from is affirmed.

Fuller, P. J., dissented.

THE RIGHT OF ELECTORS TO VOTE FOR A CANDIDATE WHOSE NAME IS NOT PRINTED ON THE OFFICIAL BALLOT.*

I. Dissent of Justice Fuller from the Principal Case.

- a. General Criticism of Majority Opinion.
- b. Views of Text-writers.

II. Review of *Commonwealth v. Reeder*.

III. Competency of Legislature to Regulate Elections.

- a. The General Rule.
- b. Regulating the Printing of Ballots.
- c. Denying the Right to Vote for Candidate of Choice.

I. Dissent of Justice Fuller from the Principal Case.

a. General Criticism of Majority Opinion.—Presiding Justice Fuller did not agree with the conclusion reached in the majority opinion of the principal case, and delivered an able dissenting opinion, in which he said: "In *Chamberlain v. Hedger*, 12 S. Dak. 135, 80 N. W. 178, all the probative facts alleged in this complaint were before the court, and it was squarely held to be the legal duty of respondents not only to canvass all votes returned for appellant at this election, but to issue a certificate in accordance with the result ascertained. If the power lies within the legislature of a state to deprive qualified electors of the right to freely express their choice as to whom they will delegate governmental authority, then the sovereignty of the nation no longer resides in the people of the nation, and this court idly trifled with a serious matter when it said, concerning the identical facts now before us, that: 'If the canvass had been made, and the certificate of election issued, plaintiff would have been clothed with a prima facie right to the office; and this was a sub-

*REFERENCES TO MONOGRAPHIC NOTES.

What distinguishing marks invalidate ballots: 49 Am. St. Rep. 240-249.
What irregularities avoid elections: 50 Am. St. Rep. 46-92.

stantial right, of which he should not have been deprived by the failure of defendants to perform their official duties.' In *Parmly v. Healy*, 7 S. Dak. 401, 64 N. W. 186, no constitutional question being even mooted, we could do no less than say, in effect, that the statute prohibited the writing of a name on a ticket, and provided punishment for the dismantled freeman who placed it there.

"The constitution guaranties to every qualified elector 'the free exercise of the right of suffrage,' and, while the legislature cannot limit him to names printed on the official ballot, this court, by fallacious reasoning, has now taken away this right to vote for the person of his choice. Quoting from our constitution the provision that 'elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage,' the writer of the majority opinion proceeds to elucidate by saying that 'there can be no inequality, and every voter shall have the same right as every other voter, namely, the right of appearing at an election and voting in the manner prescribed by law.' Until all men are viewed in exactly the same light, and the preference of one becomes the preference of all, it will be neither plausible nor reasonable to say that the right of suffrage can be freely, equally, and independently exercised under a statute which merely gives to qualified electors an option to vote for persons whose names are printed on the official ballot, or not to vote at all; and such is not, and under our system of government can never be, the law. It is manifestly absurd to hold that the elector, who is thus deprived of his privilege of choosing a public servant, stands on equal footing with those who find upon the official ballot the name of every candidate for whom they choose to vote. It is the constitutional prerogative of every qualified elector, who has complied with all preliminary statutory regulations as to registration, etc., to vote for whomsoever he may choose; and statutes which deprive him of such right have been, so far as my research extends, invariably held for naught, in every jurisdiction with the exception of this."

b. *Views of Text-writers.*—Continuing, Justice Fuller reviewed the decisions in other jurisdictions, which we here omit, for the reason that they will be fully considered elsewhere in this note, and then cited the views of text-writers in support of his contention: "At page 587, 10 *American and English Encyclopedia of Law*, second edition, the author of the article on 'Elections,' in discussing the different provisions of the Australian ballot system as adopted in many of the states, says: 'Thus they are not unconstitutional, because they provide for legal nominations, and require them to be made in a certain way in order to entitle a candidate to have his name printed on the official ballot, provided the voter is allowed by writing on the ballot to vote for others than those nominated, if he sees fit. But, as the constitutions guarantee to voters the right to vote for whom they please, a law restricting the right to vote to

those candidates whose names appear on the official ballot is to that extent unconstitutional.' That eminent author, Judge McCrary, who, as a member of the House of Representatives, was for many years chairman of the committee of elections, thus announces the universal doctrine: 'The statutes of most of the states expressly permit the voter to cast his ballot for the person of his choice for office, whether the name of the person he desires to vote for appears upon the printed ballot or not. Statutes which deny the voter this privilege are in conflict with the constitutional provision guaranteeing the right of suffrage to every citizen possessing the requisite qualifications, and are void. Legislatures may provide for the printing of an official ballot, and prohibit the use of any other, but they cannot restrict the elector in his choice of candidates, nor prohibit him from voting for any other than those whose names appear on the official ballot': McCrary on Elections, sec. 700. I am confident that the proposition will be taken for granted that the limitation of the voter to names printed on the official ballot deprives him of that secrecy and independence secured by the statute as originally adopted, and that the present amendatory system is unconstitutional in so far as it deprives him of the right to vote for the candidate of his choice."

II. Review of *Commonwealth v. Reeder*.

Since in the principal case so much reliance is placed on *Commonwealth v. Reeder*, 171 Pa. St. 505, 33 Atl. 67, it is deemed proper to give that decision some consideration. The supreme court of Pennsylvania there decided, under the usual constitutional provisions, that "all elections shall be free and equal," and qualified electors "be entitled to vote at all elections," that a statute providing for the election of seven superior judges at one time, but declaring that no elector should vote for more than six, was constitutional. This decision, on its face, is not directly in point with the doctrine advanced by the South Dakota court in the principal case. Moreover, the statutes of Pennsylvania, contrary to the South Dakota election law, preserve the right of electors to vote for any candidate whose name is not on the official ballot. But, aside from these considerations, it should be observed that the holding in the *Reeder* case is itself an exceedingly doubtful proposition of law. The decision was dissented from by Justice Williams when made, and it is directly opposed to *McArdle v. Mayor etc. of Jersey City*, 66 N. J. L. 590, 88 Am. St. Rep. 496, 49 Atl. 1013; *State v. Constantine*, 42 Ohio St. 437, 51 Am. Rep. 833; *In re Opinion of Judges (R. I.)*, 41 Atl. 1009. Our research has disclosed no authority in support of the Pennsylvania case; on the contrary, its soundness is challenged by the decisions of three other commonwealths. Nor do we think it defensible on principle. It seems to us, therefore, that the principal case, so far as it is based on *Commonwealth v. Reeder*, is built upon the sand.

III. Competency of Legislature to Regulate Elections.

a. **The General Rule.**—We come now, to the fundamental inquiry suggested by the question under discussion—namely, the nature of the right of suffrage. There has been some controversy among publicists as to whether this is a natural or a political right, the prevailing opinion being that it is a political right or privilege: *Gougar v. Timberlake*, 148 Ind. 38, 62 Am. St. Rep. 487, 46 N. E. 339; *State v. McElroy*, 44 La. Ann. 796, 32 Am. St. Rep. 355, 11 South. 133; *Anderson v. Baker*, 23 Md. 531; *People v. Barber*, 48 Hun, 198; *Spencer v. Board of Registration*, 1 McAr. 169, 29 Am. Rep. 582. However this may be, and whatever may be its significance, it seems clear that the right to vote is not an absolute right—that is, it is not a right to be exercised without restriction or limitation. The power of the legislature to regulate elections is undoubted, provided the elective franchise is regulated and not denied. The legislature has no power expressly to deny or take away the right, or unreasonably to abridge or impede its enjoyment by laws professing to be merely remedial. Its power is limited to laws regulating the enjoyment of the right, by facilitating its lawful exercise and by preventing its abuse. All reasonable latitude should be given the legislature in the exercise of this power of regulation, but statutes must be reasonable, uniform, and impartial. They must be calculated to facilitate and secure, rather than to subvert or impede, the right to vote: *Whittam v. Zahorik*, 91 Iowa, 23, 51 Am. St. Rep. 317, 59 N. W. 57; *Taylor v. Bleakley*, 55 Kan. 1, 49 Am. St. Rep. 233, 39 Pac. 1045; *Blair v. Ridgely*, 41 Mo. 63, 97 Am. Dec. 248; *Daggett v. Hudson*, 43 Ohio St. 548, 54 Am. Rep. 832, 3 N. E. 538. It may be well to observe here that statutes tending to limit the citizen in exercising the right of suffrage should be construed liberally in his favor: *Salcido v. Roberts* (Cal.), 67 Pac. 1077; *Bowers v. Smith*, 111 Mo. 45, 33 Am. St. Rep. 491, 20 S. W. 101.

b. **Regulating the Printing of Ballots.**—The regulation we are here concerned with touches the printing of the ballots. Statutes now very generally provide that only those political parties casting a certain percentage of the vote at the last election, or filing certificates of nominations made by them, shall be entitled to official ballots, or to a place on the official ballot. Such provisions, while they may inconvenience some voters, are considered a regulation of the right of suffrage, and not a denial of it. The use of official ballots renders it necessary that some limitation should be placed on the number of ballots, or the number of names on a ballot, if but one is used. Otherwise, the ballot might assume prodigious dimensions, or the polls might be "littered with ballots 'thick as autumnal leaves that strew the brooks in Vallombrosa'"; for "three persons may claim to be a political party, just as the three tailors of Tooley

street assumed to be 'the people of England'": *Ransom v. Black*, 54 N. J. L. 446, 24 Atl. 489, 1021; *Ladd v. Holmes*, 40 Or. 167, ante, p. 457, 66 Pac. 714; *De Walt v. Bartley*, 146 Pa. St. 529, 28 Am. St. Rep. 814, 24 Atl. 529. But there must be no discrimination against classes of voters: *Eaton v. Brown*, 96 Cal. 371, 31 Am. St. Rep. 225, 31 Pac. 250.

c. Denying the Right to Vote for Candidate of Choice.—These statutes, so far as we have examined them, preserve the right of electors to vote for the candidate of their choice, notwithstanding his name is not printed on the official ballots. This may be done by using pasters, or by writing the name of the candidate on the ballot. Most of the statutes provide for blanks on the official ballot, so that the voter may write therein the name of any person for whom he may desire to vote for any office: *Patterson v. Hanley*, 136 Cal. 265, 68 Pac. 821, 975; *Coughlin v. McElroy*, 72 Conn. 99, 77 Am. St. Rep. 301, 43 Atl. 854; *Fletcher v. Wall*, 172 Ill. 426, 50 N. E. 230; *Voorhees v. Arnold*, 108 Iowa, 77, 78 N. W. 795; *People v. Fox*, 114 Mich. 652, 72 N. W. 611; *Price v. Lush*, 10 Mont. 61, 24 Pac. 749; *Bowers v. Smith*, 111 Mo. 45, 33 Am. St. Rep. 491, 20 S. W. 101; *State v. Hostetter*, 137 Mo. 636, 59 Am. St. Rep. 515, 39 S. W. 270; *People v. President etc. of Wappinger's Falls*, 144 N. Y. 616, 39 N. E. 641; *Howser v. Pepper*, 8 N. Dak. 484, 79 N. W. 1018; *Morris v. Board of Canvassers*, 49 W. Va. 251, 38 S. E. 500.

"In general, it may be said that the so-called Australian ballot acts, in the various forms in which they have been enacted, in many of the states in this country, have been sustained by the courts, provided the acts permit the voter to vote for such persons as he pleases, by leaving blank spaces on the official ballot in which he may write or insert in any other proper manner the names of such persons, and by giving him the means and a reasonable opportunity to write in or insert such names": *Cole v. Tucker*, 164 Mass. 486, 41 N. E. 681. In construing the New York statute, Mr. Justice Gray says: "But that it was in nowise intended to prevent the voter to vote for any candidate whom he chose is evident from the further provisions of the law that 'the voter may write or paste upon his ballot the name of any person for whom he desires to vote for any office.' Indeed, to hold otherwise would be to disfranchise, or to disqualify, the citizen, as a voter or a candidate, and, in my opinion, to affect the law quite unnecessarily with the taint of unconstitutionality in such respects": *People v. Shaw*, 133 N. Y. 493, 31 N. E. 512.

When this question was before the supreme court of Florida in *State v. Dillon*, 32 Fla. 545, 14 South. 383, Mr. Justice Mabry very aptly observed: "The distinguishing theory of the ballot system is that every voter shall be permitted to vote for whom he pleases, and that no one else shall be in a position to know for whom he has

voted, unless the voter shall, of his own free will, inform him. There is no doubt in our minds about the right of the legislature to prescribe an official ballot, and to prohibit the use of any other; and the provisions of the act in reference to printing the names of candidates regularly nominated by a convention, mass-meeting, or primary election, or who run as independents, are valid. But the legislature cannot, in our judgment, restrict an elector to voting for some one of the candidates whose names have been printed upon the official ballot. He must be left free to vote for whom he pleases, and the constitution has guaranteed this right. If the legislature can restrict the voter to some candidate whose name is printed on the official ballot, then it may prescribe such regulations for getting the names on the ballot as will completely destroy the liberty of choice. . . . We think the voter, although confined to the use of the official ballot, could put upon it the name of any person in lieu of the name of the candidate printed thereon, and such a ballot would be legal."

Again, quoting from *Sanner v. Patton*, 155 Ill. 553, 40 N. E. 290: "It is also said that ample provision has been made whereby candidates may be nominated, and thus be entitled to have their names placed on the ticket, and that it is the intention of the act that no vote should be cast for a person who was not nominated. If such was the intention, why did not the legislature say so, and why did it say directly the contrary? What, it may be asked, is there so sacred in the nomination of a candidate for office by a political caucus that a voter should be compelled to vote for a nominee of the caucus or else be deprived of the elective franchise. . . . The legislature does not possess the power to take away from a resident citizen the right of suffrage unless he has been convicted of an infamous crime. Nor can the legislature do indirectly what they cannot do directly; and yet, if the construction contended for by appellee be the correct one, the voter is deprived of the constitutional right of suffrage. He is deprived of the right of exercising his own choice, and when this right is taken away there is nothing left worthy of the name of the right of suffrage—the boasted free ballot becomes a delusion. . . . In the supreme court of Missouri, in *Bowers v. Smith*, 17 S. W. 761, it is, among other things, said: 'By our constitution general elections are to be held at certain fixed times, and the right of suffrage is secured to every citizen possessing the requisite qualification. The new law cannot impinge upon the right of voters to select their public servants at such elections, or be so interpreted as to limit the range of choice for constitutional officers to persons nominated in the modes prescribed by it. Nominations under it entitle the nominees to places upon the official ballot printed at public expense, but the Missouri voter is still at liberty to write on his ballot other names than those which may be printed there.' "

The foregoing copious extracts from the decisions in various jurisdictions leave little to be said on the question of the right of electors to vote for a candidate whose name is not printed on the official ballot. On principle nothing can be clearer than this right, and nothing can be more subversive of a free ballot than its denial. We have not discovered a single authority, save the principal case and perhaps *Commonwealth v. Reeder*, 171 Pa. St. 505, 33 Atl. 67, that intimates the competency of the legislature to deny this right. And as before pointed out, the court in the latter case misconceived the law. We should admire the courage of the South Dakota court in announcing its conclusion in the face of the decisions of the other states, if it were defensible on principle. But regarding it, as we do, to be destructive of one of the greatest institutions yet realized in the evolution of society, we have no hesitancy in denouncing it as a dangerous precedent.

TOBIN v. McKINNEY.

[14 S. Dak. 52, 84 N. W. 228.]

APPEAL.—The Supreme Court may Affirm a Judgment on a directed verdict if it finds either of the grounds stated in the motion therefor well taken, though it may not be the ground upon which the verdict actually was directed. (p. 690.)

A Bank is not Liable to Depositors, except after demand of payment. (p. 690.)

CERTIFICATE OF DEPOSIT.—The Statute of Limitations does not begin to run on a certificate of deposit until payment has been demanded. (p. 691.)

PARTNER'S LIABILITY After Dissolution of Firm.—One who makes two deposits with a banking firm of forty and thirty-five dollars each in one year is a "person," within the rule that a partner's liability continues after the dissolution of the firm "in favor of persons who have had dealings with, and given credit to, the partnership during its existence, until they have had personal notice of its dissolution. (pp. 690, 693.)

N. J. Cramer, for the appellant.

Keith & Warren, for the respondent.

⁵⁵ CORSON J. From the year 1880 to the 1st of January, 1885, Charles E. McKinney, the defendant, was a partner in the firm of McKinney & Scougal, engaged in the business of banking in the cities of Sioux Falls and Yankton. At the last-mentioned date the partnership was dissolved, and the business

was continued in Yankton by Scougal, one of the said partners, at the same place, using the same kind of bank checks, bills, drafts, certificates of deposit, and letter-heads, excepting the omission of the name of C. E. McKinney on one corner of the letter-heads, and retaining the same signs on the bank and building that the firm of McKinney & Scougal had used. ⁵⁶ There was evidence tending to prove that the plaintiff, Catherine Tobin, in June, 1884, deposited forty dollars in the bank at Yankton, and in September deposited thirty-five dollars more, which sums were withdrawn therefrom in the fall of 1884 and spring of 1885. Certificates of deposit with the name "McKinney & Scougal, Bankers," printed at the top, and the firm name of McKinney & Scougal signed at the bottom, were given to the plaintiff for said deposits. On the sixteenth day of July, 1889, she deposited in said bank five hundred dollars, for which a certificate was issued, as follows:

"No. 2599.

"McKinney & Scougal, Bankers.

"Yankton, Dakota, July 16, 1889.

"Certificate of deposit, not subject to check. \$500. Catherine Tobin has deposited in this bank five hundred dollars, payable to the order of herself in current funds on return of this certificate properly indorsed. With interest at six per cent per annum if left six months.

"MCKINNEY & SCOUGAL."

Upon this certificate interest was paid semi-annually from 1890 to 1892, inclusive. The plaintiff had resided in Yankton from 1877 to the time of the trial. Scougal was a resident of Yankton, and the defendant McKinney was a resident of Sioux Falls. It was claimed that no personal notice of the dissolution of the firm was given to the plaintiff, and that she had no actual notice or knowledge of the dissolution of the firm until after the death of Scougal, in January, 1893. Notice of such dissolution was published in January, 1885, in a newspaper in Yankton and in one in Sioux Falls. The plaintiff brought this action in July, 1898, to recover of the defendant the amount of said certificate of deposit. The case was tried to a jury, and on motion of the defendant a verdict was directed in his favor. From the judgment the plaintiff appeals to this court.

The motion for a direction of a verdict was made upon the following grounds, among others: That the plaintiff has failed to show that she was a customer of the bank, or had had business transactions ⁵⁷ with it to the extent of giving credit to

the bank prior to 1885, or that she continued such business upon the faith that this defendant remained a partner of said Scougal subsequent to that time; that the claim in question is barred by the statute of limitations, the certificate having been issued in July, 1889. The court directed a verdict upon the latter ground, but, as there are other grounds stated in the motion, this court is not precluded from affirming the judgment if it finds either of the grounds stated well taken, though it may not be the ground upon which the verdict was actually directed.

The case, as we view it, presents two questions: 1. Was the action barred by the statute of limitations? 2. Did the plaintiff have such dealings with the partnership during its existence as to entitle her to personal notice of its dissolution, and in the absence of such notice enable her to maintain this action? The first question is substantially disposed of by the decision in *Cornwall v. McKinney*, 12 S. Dak. 118, 80 N. W. 171. In that case this court held, in effect, that an action upon a certificate of deposit issued by a bank in the usual form cannot be maintained until payment of the same has been demanded, adopting the view of Mr. Daniel, in his work on *Negotiable Instruments*. Upon the subject of the statute of limitations Mr. Daniel says: "The better opinion seems to us to be that the statute of limitations only begins to run when there is an actual demand of payment in due form, and that such demand must precede a suit": Daniel on *Negotiable Instruments*, sec. 1707a. There is a conflict in the authorities, but the rule as stated by Mr. Daniel is fully sustained by the courts of New York, Pennsylvania, Vermont, and Maryland (*Munger v. Albany City Nat. Bank*, 85 N. Y. 587; *Howell v. Adams*, 68 N. Y. 314; *McGough v. Jamison*, 107 Pa. St. 336; *Bellows Falls Bank v. Rutland Co. Bank*, 40 Vt. 377; *Fells Point Sav. Inst. v. Weedon*, 18 Md. 320, 81 Am. Dec. 603), and is, in our opinion, the better rule. In *Howell v. Adams*, 68 N. Y. 314, the court of appeals of ⁵⁸ New York uses the following language: "The defendant insists that the cause of action on the certificate issued in 1863 was barred by the statute of limitations. The action was commenced in 1871, and it is claimed that the right of action accrued immediately upon the issuing of the certificate without previous demand. This question has been settled by authority: *Downes v. Phoenix Bank*, 6 Hill, 297; *Payne v. Gardiner*, 29 N. Y. 146. We think it is in accordance with the general understanding of the commercial community that a bank is not liable to depositors except after a demand of payment. The fact that a certificate is given upon a deposit being made, payable on the return of the

certificate, instead of leaving the deposit subject generally to check or draft, does not change the reason of the rule that the banker must be first called upon for payment before an action can be maintained." As no right of action accrued upon this certificate of deposit before a demand, and the statute of limitations not commencing to run until demand is made, this action was not barred, as no demand was made until a short time prior to the commencement of the action.

The second question involved in this case is one of more difficulty. Upon this subject our code provides as follows: "The liability of a general partner for the acts of his copartners continues, even after a dissolution of the partnership, in favor of persons who have had dealings with, and given credit to, the partnership, during its existence, until they have had personal notice of the dissolution; and in favor of other persons, until such dissolution has been advertised in a newspaper published in every county where the partnership, at the time of its dissolution, had a place of business; to the extent, in either case, to which such persons part with value, in good faith, and in the belief that such partner is still a member of the firm": Comp. Laws, sec. 4059. The first question arising under this section is, What construction is to be placed upon the clause, "in favor of ⁵⁹ persons who have had dealings with, and given credit to, the partnership, during its existence, until they have had personal notice of its dissolution"? It is contended on the part of the appellant that the plaintiff in this action, by making the two deposits of forty dollars and thirty-five dollars in 1884, brought herself within the provisions of the section, and is entitled to recover in this action unless she had actual notice of the dissolution of the partnership. The respondent, on the other hand, contends that these two deposits do not constitute evidence that she was in the habit of dealing with the partnership, and that by reason of these acts she cannot be said to be a person who has "had dealings with, and given credit to, the partnership," within the meaning of the section above quoted. Section 4059 of our code is a verbatim copy of section 1315 of the Civil Code prepared by the commissioners for the state of New York. In a note to that section the commissioners refer to *Vernon v. Manhattan Co.*, 22 Wend. 183, and *Clapp v. Rogers*, 12 N. Y. 283, as decisions upon which the section is based. In *Clapp v. Rogers*, 12 N. Y. 283, it appears that the firm of Rogers & Co., on the 13th of November, 1847, purchased a small bill of goods of the plaintiff, amounting to eleven dollars and three cents,

which were paid for in the spring of 1848; that the firm purchased another small bill of goods in the spring of 1848, amounting to twenty dollars and forty cents, and paid for the same in December, 1848; that on the 1st of January, 1849, the copartnership was dissolved; that between the 25th of January, 1849, and April, 1850, the plaintiff sold and delivered to said firm goods to the value of eleven hundred and seventy-five dollars and forty-two cents. The action was brought to recover of the withdrawing partner the amount of the last-mentioned bill on the ground that the plaintiff had no actual notice of the withdrawal of said defendant from the firm. The court held that the plaintiff was entitled to recover. It will be noticed that the transactions in that case between Rogers & Co. and Clapp were very similar to the transactions in the ⁶⁰ case at bar. In that case the court said: "What shall constitute a dealing with a firm which will make it requisite to give a personal notice of the withdrawal of a partner has not often been the subject of discussion. The question was considered in *Vernon v. Manhattan Co.*, 22 Wend. 183, but that case does not, in its particular facts, bear very strikingly upon the present question. We are disposed, however, to adopt the rule laid down in that case by the chancellor. He said that the word 'dealing,' when used in reference to this question, was a general term 'to convey the idea that the person who is entitled to actual notice of the dissolution must be one who has had business relations with the firm by which a credit is raised upon the faith of the copartnership'; and he refers to Bell's Commentaries, where it is said that 'a credit already raised upon the faith of the partnership is presumed to be continued on the same footing unless special notice of a change shall be given': 2 Bell's Commentaries, 640. . . . But, as before remarked, I am of opinion that a credit was given in this case, though it was not for any definite time; and this brings it within the rule stated by the chancellor. . . . The rule requiring notice proceeds upon a general presumption that one giving credit to a mercantile firm does so upon the responsibility of the individual partners; and we cannot annex to it a distinction based upon the amount of the credit without destroying that certainty which is essential to its utility." It would seem, therefore, that the commissioners, in recommending this section, intended to lay down a general rule embracing all persons who have had dealings with, or given credit to, the partnership, without regard to the amount of the credit. And we must presume that the codifiers of our

own code, and the legislature that adopted it, had the same rule in view. If, as claimed by the appellant, she did make the deposits mentioned, receiving therefor certificates of deposit signed in the firm name, we must presume that credit ⁶¹ was given upon the responsibility of the individual members of the firm, and that she had a right to assume that the firm continued as it then existed at the time she deposited the five hundred dollars; and if she, in good faith, believed, when she made that deposit, that the defendant was still a member of said firm, and she had no personal notice to the contrary, her previous transactions with the firm would entitle her to recover if in fact those deposits were actually made as claimed by appellant. Upon this question there is a conflict in the evidence, and the case should have been submitted to the jury.

It is contended on the part of the respondent that to entitle the appellant to recover she must have been in the habit of dealing with the firm. It is true this language is used in Story on Partnership (section 161), and by Mr. Justice Brewer in delivering the opinion of the supreme court of Kansas in *Merritt v. Williams*, 17 Kan. 287; but it will be noticed that this is not the language of our statute, and we cannot so construe it as to embrace such language without interpolating into the statute other words, which in this case we are not authorized to do. We are inclined to say, in the language of the court in *Clapp v. Rogers*, 12 N. Y. 283, that this case does not afford a very striking exemplification of the rule, for the dealing was so limited in amount that there is no great reason to believe that the plaintiff would have taken the trouble to ascertain who the partners were. We cannot, however, say positively that she did not. It would be dangerous for this court to attempt to graft upon this section exceptions or limitations that have not been provided by the legislature. These views lead to the conclusion that the learned circuit court erred in directing a verdict, and the judgment of that court is reversed, and the case remanded for a new trial.

The Principal Case, on rehearing, was affirmed in 15 S. Dak. 257, 88 N. W. 572, post, p. 694. See the cross-reference note thereto for further authorities on this question.

TOBIN v. MCKINNEY.

[15 S. Dak. 257, 88 N. W. 572.]

A CERTIFICATE OF DEPOSIT, payable to the order of the depositor on its return properly indorsed, does not mature until so returned, and a suit thereon cannot be maintained without demand. (pp. 694, 695.)

CERTIFICATE OF DEPOSIT.—The Statute of Limitations does not begin to run against a certificate of deposit until a demand for payment. (pp. 694, 695.)

N. J. Cramer, for the appellant.

Keith & Warren, for the respondents.

²⁵⁸ FULLER, P. J. The facts essential to a proper understanding of all that is urged on this rehearing are fully stated in *Tobin v. McKinney*, 14 S. Dak. 52, ante, p. 688, 84 N. W. 22S, and the only question of law to be determined is whether the statute of limitations began to run on a certain certificate of deposit before payment was demanded. Like any other contract, the character of a certificate of deposit depends upon the intention of the parties, as disclosed by the terms of such instrument; and section 4465 of the Compiled Laws, providing that "a negotiable instrument which does not specify the terms of payment is payable immediately," is, by a general provision, made "subordinate to the intention of the parties, when ascertained in the manner prescribed by the chapter on the interpretation of contracts": Comp. Laws, sec. 4571. Now, this transaction being a deposit of money for safekeeping, neither party contemplated the execution of a contract bearing inceptively the stamp of dishonor, upon which a cause of action accrued instantaneously, without first calling upon the banker for payment, and the terms of the instrument will bear no such construction. While its negotiability is not destroyed by the provision, "payable to the order of herself, in current funds, on return of this certificate properly indorsed," the date of maturity is thereby expressly made to depend on an act to be performed by the holder in reference thereto, and nothing was payable thereon until the happening of such contingency. If no time is to elapse ²⁵⁹ between the issuance of a certificate of deposit and its actual and apparent maturity, section 4570 of the Compiled Laws, providing that "a transferee of a certificate of deposit, after its apparent maturity or actual dishonor within his knowledge, acquires a title equal to that of a transferee before such

event," is wholly inoperative and meaningless withal. According to the usual practice of commercial communities, this certificate was made payable on its return to a place specified, which, in itself, is equivalent to an agreement between the parties that the banker must be first called upon for payment before an action can be maintained. Had the deposit been made subject to check, appellant's right to demand the money at any time would have been no greater than it is at present, and the difference in such transactions in no way encroaches upon the doctrine that a depositor must demand payment before the institution of a suit to recover his money. The rule arises from the reason that it would be grossly unjust to give a depositor for an indefinite period the right to sue the next moment, without the slightest intimation that he desired to recall his money; and there is nothing in our statute to justify the inference that without a demand a suit is maintainable on a certificate of deposit in the usual form. Adhering to our former opinion, the judgment appealed from is reversed, and the case remanded for a new trial.

The Statute of Limitations, according to some decisions, does not begin to run against a certificate of deposit until a demand is made for payment; according to others, it runs from the date of the certificate: See *Merene v. First Nat. Bank*, 112 Iowa, 11, 84 Am. St. Rep. 318, 83 N. W. 711; monographic note to *Hillsinger v. Georgia R. R. Bank*, 75 Am. St. Rep. 48-51.

McCARRIER v. HOLLISTER.

[15 S. Dak. 366, 89 N. W. 862.]

INDEPENDENT CONTRACTOR—Negligence of.—If an independent contractor leaves an excavation unguarded in a public street, the property owner is liable to one injured by falling into it. (p. 698.)

Davis, Lyon & Gates, for the appellant.

A. B. Kittredge, for the respondent.

307 **HANEY, P. J.** This action was brought to recover for injuries caused by falling into an open ditch on or near premises in the city of Sioux Falls owned by the defendant and occupied by a tenant. For the purpose of connecting her tenement with

the city sewer, defendant employed skillful and careful contractors, under an agreement whereby they were to dig the ditch, lay the pipe, make connections, furnish all materials, and do everything necessary to complete the work for thirty-one dollars. The work was begun Friday, August 4, 1899, and completed on the following Monday. The ditch extended from near the center of the street, under the sidewalk, and across defendant's lot to the house. There was no fence where the ditch entered the lot. The walk was on a level with the lawn, and two feet from the line of the lot. The accident occurred between 9 and 10 o'clock Sunday evening. The pipe had then been laid, and the ditch filled from the center of the street to the walk, but was open from the walk to the house. There were no light or guards to give warning of the danger. In passing along the walk, plaintiff fell into the ditch, and was injured. The jury having returned a verdict for two thousand dollars, defendant appealed from the judgment entered thereon.

The jury having found under proper instructions that ordinary care was not exercised to protect persons passing on the walk at the time of the accident, and that the plaintiff was not guilty of contributory negligence, the only question demanding attention is whether the contractors, who, without defendant's knowledge, left the excavation unguarded, are alone liable for plaintiff's injuries. ⁶⁶⁸ It is disclosed by the evidence that the work was done by independent contractors. Respondent concedes the general rule to be that property owners are not responsible for injuries caused by the negligence of competent, independent contractors, but contends that there are certain well-established exceptions to the general rule, and that this case falls within such exceptions. Actions in which the liability of property owners for the negligence of independent contractors has been involved are so numerous that an exhaustive review of them would extend this opinion beyond all reasonable limits: 16 Am. & Eng. Ency. of Law, 2d ed., 187-210; note to Covington etc. Bridge Co. v. Steinbrock, 76 Am. St. Rep. 375. The issues presented by this appeal have received thoughtful consideration. While the legal principles involved in this class of litigation are stated by the authorities with measurable clearness and precision, their proper application to the facts of any particular case is often extremely difficult. For the purposes of this appeal the general rule, with its qualifications, may be stated thus: While the master is liable for the negligence of the servant, yet when the person employed is engaged under an entire contract

for a gross sum in an independent operation, and is not subject to the direction and control of his employer, the relation is not regarded as that of master and servant, but as that of contractor and contractee; and in such case the general rule is that the negligence of the contracting party cannot be charged upon him for whom the work is to be done; and this rule is applicable even where the owner of the land is the person who hires the contractor, and for whose benefit the work is done. If, however, the performance of the work will necessarily bring wrongful consequences to pass unless guarded against, the law may hold the employer answerable for negligence in the performance of the work: *Boomer v. Wilbur*, 176 Mass. 369 482, 57 N. E. 1004. If the work contracted for is of such a character that it is intrinsically dangerous, or will probably result in injury to third persons, one contracting to have it done is liable for such injuries, though the injury may be avoided if the contractor take proper precautions, there being a distinction between such a case and one in which the work contracted for is such that, if properly done, no injurious consequences can arise. As was stated by Cockburn, C. J., in *Bower v. Peate*, 1 Q. B. D. 321: "There is an obvious difference between committing work to a contractor to be executed, from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted. While it may be just to hold the party authorizing the work in the former case exempt from liability from injury resulting from negligence which he had no reason to anticipate, there is, on the other hand, good ground for holding him liable for injury caused by an act certain to be attended with injurious consequences if such consequences are not in fact prevented, no matter through whose default the omission to take the necessary measures for such prevention may arise": 16 Am. & Eng. Ency. of Law, 2d ed., 201. The contract in the case at bar contemplated an excavation in one of the principal streets of the city of Sioux Falls. The work contracted for could not be done without creating a condition in the public thoroughfare from which mischievous consequences might reasonably be expected to arise unless preventive measures were adopted. An excavation for the purpose of constructing a sewer may not be unlawful, but it is certainly intrinsically dangerous, and, unless properly guarded, liable to cause personal injuries. The nature of the work demands more than its proper performance. 270 Digging the

ditch and laying the pipe are not enough. Lights, barriers, or other safeguards are required during the progress of the work to protect persons from such accidents as the one resulting in plaintiff's injury. Where the work contemplated by the contract is of such a nature that the public safety requires something more to be done than the mere construction of the improvement, we think the owner of the property owes a duty to the public to see that proper safeguards are taken, and that, where such precautions are not taken, he should not escape liability for resulting injuries.

The judgment of the circuit court is affirmed.

If an Independent Contractor, in the prosecution of his work, leaves an excavation in the public streets unguarded, his employer is liable for injuries resulting to third persons: See the monographic note to Covington etc. Bridge Co. v. Steinbrock, 76 Am. St. Rep. 406.

MACH v. BLANCHARD.

[15 S. Dak. 432, 90 N. W. 1042.]

COLLATERAL ATTACK.—A Judgment by Default, erroneous in granting relief not demanded, is not void and open to collateral attack. (pp. 701, 702.)

REVERSAL OF JUDGMENT.—A Mortgage is Nullified by the reversal of a judgment on which the mortgagor's title rested. (pp. 702, 705.)

Action by Annie Mach against William Blanchard for the cancellation of a mortgage. From a judgment for the plaintiff the defendant appeals.

R. B. Tripp, for the appellant.

French & Orvis, for the respondent.

⁴³⁵ HANEY, P. J. This appeal is from an order sustaining a demurrer to the answer on the ground that it fails to state a defense. Defendant having elected to stand on his answer, judgment was rendered in favor of the plaintiff, from which the defendant appealed.

⁴³⁶ The following facts are admitted by the demurrer: In September, 1882, Joseph Parszyk, who owned a quarter section of land in Yankton county, executed and delivered a warranty

deed purporting to convey the same to Annie Mach, plaintiff in this action. The deed, having been duly acknowledged, was recorded October 3, 1882. In November, 1896, Parszyk commenced an action to have the deed canceled, alleging in his complaint that when it was executed he was of unsound mind, and wholly incapable by reason of his mental derangement of performing any act of business; that he had subsequently been restored to mental capacity; that prior to the commencement of the action he offered to restore everything of value received at the time of the conveyance; that such offer was rejected, and that the defendant therein refused to reconvey the land. He demanded judgment "that the warranty deed from plaintiff to defendant be delivered up for cancellation, and that the said deed be duly canceled of record by the register of deeds of said county, and for such other and further relief as may be just and equitable, besides the costs of this action." The summons was personally served upon Annie Mach in Yankton county. On January 23, 1897, she having made default, a judgment was entered, wherein it was ordered, adjudged, and decreed that the deed from Parszyk to her "be, and the same is hereby, canceled, and the title to the said described property be, and it is hereby, confirmed in the plaintiff, Joseph Parszyk, and the register of deeds of Yankton county, South Dakota, is hereby authorized and directed to cancel said deed of record; and it is further ordered that the defendant, Annie Mach, and all persons claiming by, through or under her, be and she and they are hereby, forever barred and enjoined from asserting any right, title, or interest of whatsoever kind to said property." On January 29, 1897, after this judgment had been duly recorded ⁴³⁷ in the office of the register of deeds, Parszyk borrowed eight hundred dollars of the defendant Blanchard, giving as security a mortgage on the land in controversy, which was recorded on the same day. On the following day Annie Mach, by her attorneys, served upon the attorneys for Parszyk a notice of motion to vacate the default judgment and for leave to serve and file an answer. This motion coming on for hearing on March 23, 1897, it was ordered that the default be opened, and that the defendant be allowed to serve and file an answer. An appeal having been taken to this court, the order opening the default was affirmed: *Parszyk v. Mach*, 10 S. Dak. 555, 74 N. W. 1027. On December 1, 1898, a judgment was entered on motion of the plaintiff Parszyk, dismissing the action without prejudice and awarding the defendant her costs and disbursements. In the

meantime the land had been sold under and by virtue of the power of sale contained in the mortgage, and a certificate of sale issued to the mortgagee, the defendant in this action. After the former action was dismissed, the present action was commenced, for the purpose of having defendant's mortgage declared to be void and of no legal effect.

If Parszyk was a person entirely without understanding when the deed to plaintiff was executed, title to the land in controversy was not conveyed from the former to the latter: Comp. Laws, sec. 2519. If he was then a person of unsound mind, but not entirely without understanding, his incapacity not having been judicially determined, the title passed, subject to rescission: Comp. Laws, sec. 2520. If Parszyk belonged to the first-mentioned class of persons, the title was in fact in him when the mortgage was executed, independently of the default judgment. While record evidence of a transfer may, under certain circumstances, be conclusive, the recording of an instrument or judgment affecting real property in the office of the ⁴³⁸ register of deeds does not of itself transfer the title. In this state there may be a valid transfer as between the parties thereto and those having notice thereof, by means of an unrecorded instrument: Comp. Laws, sec. 3297. Although purchasers of the plaintiff for value and without notice might have been protected by the record evidence of the transfer from Parszyk to her, as between the parties to the warranty deed there was no transfer in fact, if Parszyk was a person entirely without understanding when that instrument was executed. However, no issue is raised by the answer as to Parszyk's mental condition in fact, the defendant basing his rights alone upon the existence of the default judgment when his mortgage was executed. As his counsel has argued the case upon the theory that the judgment operated to transfer the title from the plaintiff to Parszyk, it will be assumed that the deed from Parszyk to the plaintiff conveyed the title, subject to the former's right of rescission. We will also assume that the judgment revested title in Parszyk, and proceed to consider what, if any, effect its vacation had upon the mortgage executed after it was entered and before the default was opened by order of the circuit court. The judgment was either regular, erroneous, or void. If it was void, it was ineffectual for any purpose, and defendant could derive no title through it. If it was merely erroneous, or if it was in all respects regular, assuming that title can be transferred by the mere entry of a judgment, defendant's rights under the mort-

gave are unassailable, unless affected by the subsequent proceedings in the action wherein the judgment was rendered. Was the judgment void? The court had jurisdiction of the parties. It had authority to hear and determine actions for the rescission of contracts and conveyances made by persons of unsound mind; and the complaint stated facts sufficient to constitute a cause of action: *Parszyk v. Mach*, 10 S. Dak. 555, 74 N. W. 1027.

⁴³⁹ It is contended, however, that the judgment was void, for the reason that it granted relief not demanded in the complaint. In the decision on the appeal from the order opening the default, this court said "that, while the complaint states a cause of action, no substantial relief was demanded; and there being no answer, nothing in excess of the prayer could be granted. In order to sustain a judgment by default under section 5097, *supra*, although the pleader has stated facts that are actionable, the relief granted must not exceed what was demanded: *Simonson v. Blake*, 20 How. Pr. 484; *Bullwinker v. Ryker*, 12 Abb. Pr. 311. That the decree in this instance grants relief not demanded is so clear that further comment would be wholly gratuitous." It was further decided—the only question necessarily involved in the appeal—that the circuit court did not abuse its discretion in opening the default: *Parszyk v. Mach*, 10 S. Dak. 555, 74 N. W. 1027. This court having evidently assumed that it was dealing with a direct attack, its decision cannot be construed as authority for holding that the judgment was void. In New York, Iowa, California, and Wisconsin, under statutes relating to demands for relief and relief in default cases substantially, if not identically, the same as those in this state, the courts of last resort have held that, where the defendant has not answered and the judgment grants relief not demanded in the complaint, the judgment is not on that account void, but only erroneous, and it cannot be assailed in a collateral proceeding: *Harrison v. Union Trust Co.*, 144 N. Y. 326, 39 N. E. 353; *Ketchum v. White*, 72 Iowa, 193, 33 N. W. 627; *Bond v. Pacheco*, 30 Cal. 530; *Chase v. Christianson*, 41 Cal. 253; *Jones v. Jones*, 78 Wis. 446, 47 N. W. 728. The same conclusion was, in effect, reached by this court in *McArthur v. Southard*, 10 S. Dak. 566, 74 N. W. 1031. And this court has held in a criminal action that, where the court below has jurisdiction of the person and ⁴⁴⁰ of the offense, the imposition of a sentence in excess of what the law permits does not render the judgment void: *In re Taylor*, 7 S. Dak. 382, 58 Am. St. Rep. 843, 64 N. W. 253. Our conclusion is that the judgment in *Parszyk v.*

Mach, 10 S. Dak. 555, 74 N. W. 1027, was erroneous, but not void, and that it cannot be assailed in this action. This view is supported by abundant authority and is consonant with sound reason.

The judgment being erroneous, but not void, and having been entered when defendant's mortgage was executed, the consequences of its subsequent vacation or reversal in the due course of litigation remain to be considered. Though it was not vacated by the order opening the default, the dismissal of the action operated to set it aside. The default was opened within the time allowed by law, and such further proceedings were had that the judgment ceased to exist. The action terminated in favor of the defendant. There was, in effect, a reversal of the judgment in due course of legal procedure, subsequent to the execution of defendant's mortgage, and the question arises, What was the effect of such reversal upon the rights of the mortgagee? It certainly will be conceded that whatever rights to the mortgaged property were conferred on the mortgagor by the judgment were, as to him at least, restored by its reversal. Nearly all the authorities hold that, where the plaintiff purchases the property of the defendant, at a sale under a judgment or decree, his title will be defeated by subsequent reversal. It is also a rule nowhere disputed that third persons, purchasing at a sale made under the authority of a judgment or decree, not suspended by any stay of proceedings, thereby acquire rights which no subsequent reversal of such judgment or decree can in any respect impair: Freeman on Judgments, secs. 482, 484. The latter rule rests on grounds of public policy. It is intended to encourage bidding at ⁴⁴¹ judicial sales, and thus protect defendants from having their property sacrificed at nominal prices. Had Parszyk obtained a money judgment, and defendant purchased plaintiff's property at a sale under an execution issued thereon prior to the opening of the default, the subsequent dismissal of the action would not have affected his rights. In that case defendant's purchase would have been made while the action was pending, and liable to be vacated or reversed in the usual course of procedure. He would be protected, not because he was without notice of the pendency of the action, or notice that proceedings had been or would be taken to reverse the judgment, but because rights acquired by judicial sales are protected in the interests of those whose property is thus conveyed by operation of law. Defendant's position as mortgagee cannot be regarded as more favorable than that of a purchaser.

There was in this case no judicial sale. "An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment be sooner satisfied": Comp. Laws, sec. 5343. This is a general provision of the law of civil procedure. Its language is plain. Had the legislature intended that civil actions should be deemed to be pending during the period mentioned for certain purposes only, it would have so expressed itself. Defendant was bound to know the law. He was bound to know that the judgment upon which his mortgagor's title depended was liable to be vacated or reversed in the authorized course of civil procedure. One who purchases a judgment takes it at the peril of having it vacated or reversed. Why should the defendant in this action stand in any better position than the assignee of a money judgment? The reason for the rule which protects purchasers at judicial sales cannot be invoked. "When the reason for a rule ceases, so should the rule itself": Comp. Laws, sec. 4697. Assuming ⁴⁴² that the judgment was self-executing and operated as a conveyance—a proposition not free from doubt in this state—it certainly did not vest an indefeasible title in Parszyk. His rights rested upon a pending action, and we can discover no reason for holding that the defendant acquired any rights superior to those of his mortgagor. It is no greater hardship for defendant to lose his security than it would be for the plaintiff to lose her land. Her failure to defend before the opening of the default has been adjudged excusable. Defendant may have been ill-advised as to the law, but that was not the fault of the plaintiff. It may be proper to add that defendant did not act upon the advice of his present counsel, and that persons of ordinary prudence do not usually make real estate loans under the circumstances disclosed in this case.

As heretofore suggested, decisions involving judicial sales are not applicable to this appeal. Therefore, many authorities cited by appellant's counsel require no consideration. It was held in Nebraska that where a district court enters a decree quieting title to real estate in a party to the action, and such party sells and conveys it to an innocent third person for a valuable consideration, and afterward the decree, not having been superseded by bond, is reversed in the appellate court, such purchaser will not be affected by the reversal: *Parker v. Courtney*, 28 Neb. 605, 26 Am. St. Rep. 360, 44 N. W. 863. The opposite conclusion was reached by the supreme court of Minnesota in an

opinion wherein the reason of the rule which protects purchasers at sales made under executions of judgments is stated with accuracy and clearness, and wherein it is shown that such rule has no application to persons who purchase from the plaintiff in actions to quiet title: *Lord v. Hawkins*, 39 Minn. 73, 38 N. W. 639. The Nebraska decision will be found to rest largely upon an early Ohio case strikingly analogous to the one at bar. It was there held ⁴⁴³ that the decree in an action to obtain a conveyance of certain land operated as a conveyance, subject, as between the parties, to a reversion of the title by a reversal, and that, the plaintiff having conveyed before citation of error was served, a reversal did not divest the purchaser's title. Concerning the second proposition the court said: "But the most difficult and important point in this case is as to the effect the reversal is to have upon the rights of third persons, legitimately and innocently acquired. After the time limited in the decree itself had transpired, and the decree became an absolute title, the party thus invested with title and in possession of the land sold and conveyed it to a third person, who stands before the court as an innocent purchaser for a valuable consideration without notice. Can his rights be divested by a reversal of the decree upon which his title was originally founded? We are of opinion that they cannot be so divested. When James Boyd conveyed to Abraham Boyd, he had a complete title, which it was competent for him to transmit by conveyance in the usual mode. In making this conveyance he divested himself of title, and invested it in Abraham Boyd, the defendant, who reposed himself upon the solemn and final decree of a court of competent jurisdiction, then in full force and of unquestionable validity. By this act of conveyance, made in good faith, James Boyd put an end to his power over the land. He could not resume his interest in it without the consent of his grantee, and no decree subsequently made in the suit, or in any new suit growing out of it, against James Boyd, could affect an interest which he had not in the subject. This consequence, upon the premises here assumed, seems to be conceded by the counsel for the plaintiff. But he argues that the conveyance cannot be treated as one made in good faith, because, as he insists, it was made *pendente lite*. If this position be correct, the result contended for necessarily follows; for a ⁴⁴⁴ conveyance of a subject in litigation, made pending the litigation, is universally treated as made in bad faith, and as universally held not to change the rights of any of the parties": *Taylor v. Boyd*, 3 Ohio, 338, 17 Am. Dec. 603.

The court then discussed the contention that a writ of error is but a continuance of the original suit, and reached the conclusion that it is itself a new and original proceeding, which can only affect parties or strangers from the service of the citation. If the action wherein the decree was rendered had been "deemed to be pending" when the property was conveyed to the purchaser, the court could not, in harmony with its own reasoning, have decided in his favor. As has been shown, the Parszyk-Mach action was pending when the defendant's mortgage was executed. Read in connection with our statutes defining the pendency of actions and our appellate procedure in civil actions, the Ohio decision sustains the view heretofore taken of the rights of both Parszyk and the defendant. The following cases are to the same effect—the purchaser being protected because the judgment was reversed on writ of error or bill of review, and therefore the action was not pending: *Macklin v. Allenberg*, 100 Mo. 337, 13 S. W. 350; *McCormick v. McClure*, 6 Blackf. 466, 39 Am. Dec. 441; *Rector v. Fitzgerald*, 8 C. C. A. 277, 59 Fed. 808; *Ludlow v. Kidd*, 3 Ohio, 541.

We think the learned circuit court did not err in sustaining the demurrer to defendant's answer, and its judgment is affirmed.

Corson, J., dissents.

A Judgment by Default for relief not prayed for is held void in *Russell v. Shurtleff*, 23 Colo. 414, 89 Am. St. Rep. 216, 65 Pac. 27.

The Effect of the Reversal of a Judgment is, in general, to leave the parties where they stood before its rendition: *Ward v. Marshall*, 96 Cal. 155, 31 Am. St. Rep. 198, 30 Pac. 1113. The reversal of a judgment quieting title, however, does not affect a bona fide purchaser: *Parker v. Courtney*, 28 Neb. 605, 26 Am. St. Rep. 360, 44 N. W. 863. See, also, *Welcker v. Staples*, 83 Tenn. 49, 17 Am. St. Rep. 869, 12 S. W. 340; *Quan Wo Chung Co. v. Laumeister*, 83 Cal. 394, 17 Am. St. Rep. 261, 23 Pac. 320; *Adams v. Odom*, 74 Tex. 206, 15 Am. St. Rep. 827, 12 S. W. 34; *Gould v. Sternburg*, 128 Ill. 510, 15 Am. St. Rep. 138, 21 N. E. 628; *Withers v. Jacks*, 79 Cal. 297, 12 Am. St. Rep. 143, 21 Pac. 824; *Bridges v. McAllister*, 106 Ky. 791, 90 Am. St. Rep. 267, 51 S. W. 603.

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CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

GRAY v. TELEGRAPH COMPANY.

[108 Tenn. 39, 64 S. W. 1063.]

TELEGRAPH COMPANIES—Recovery for Mental Anguish—Conflict of Laws.—The sender of a telegraph message from one state to a point in another state may recover in the latter state for mental anguish suffered through negligent delay in the delivery of the message, when such recovery is authorized by the statutes of that state, although in the state from which the message was sent no recovery can be had for mental anguish. (p. 712.)

TELEGRAPH COMPANIES—Interstate Commerce—Delay in Delivery of Messages.—A statute enforcing the prompt delivery of telegraph messages and making the company guilty of a misdemeanor and liable in damages for a failure to deliver messages promptly, is not an unlawful interference with interstate commerce when applied to messages sent from one state for delivery in the state enacting such statute. (p. 713.)

TELEGRAPH COMPANIES—Delay in Delivery—Person Injured.—The sender of a telegraph message is a person aggrieved by negligent delay in its transmission and delivery. (p. 714.)

Givens & Hensley and Burkett, Miller & Mansfield, for the plaintiff.

F. V. Brown and B. G. McKenzie, for the defendant.

⁴⁰ McALISTER, J. Kate N. Gray, a married woman, brings this suit by C. H. Gray, her husband, as next friend, against the defendant company, to recover damages for failing promptly to transmit and deliver a telegram sent by her from Taylors, Mississippi, to her husband, C. H. Gray, at Dayton, Tennessee, informing him of the serious illness of their daughter, and requesting him to come to Taylors.

The trial below resulted in a verdict and judgment in favor of the plaintiff for nominal damages. Plaintiff appealed, and has assigned errors. The facts are practically undisputed. It appears that in July, 1900, C. H. Gray was at Dayton, Tennessee, where for some months he had been engaged in business, and at that time his wife, Kate N. Gray, with her daughter, Louise, were in the state of Mississippi, where the family resided. It further appears that C. H. Gray still retained his residence in Mississippi. On July 15, 1900, Mrs. Gray addressed to her husband the following telegram, to wit: "Louise is sick. Come on first train. Stop at Taylors." This message was promptly transmitted to Dayton, but was held at the latter place from the afternoon ⁴¹ of July 15th until the morning of the 16th, when it was delivered to the sendee. The daughter died at 10 P. M. on July 15th, and was buried, on advice of physicians, at 5 P. M., July 16th. It is alleged that in consequence of the negligence of the company in delivering the message, the plaintiff's husband, C. H. Gray, was unable to be with plaintiff at the funeral, to comfort and minister to her.

On the morning of July 16th, after receipt of his wife's message, C. H. Gray telegraphed as follows: "Unless Louise is dangerous, cannot come until first of month." Shortly after this message was sent, plaintiff received another telegram, sent at the request of his wife, stating: "Louise died at 10 P. M. yesterday. Come on first train to Taylors." C. H. Gray, the husband, then left Dayton on the afternoon of July 16th, and reached Taylors on the morning of July 17th, but the daughter had been buried at 5 P. M. on July 16th. It appears that if the telegram from Mrs. Gray, which was received at the office of the company in Dayton at 5:50 P. M. on July 15th had been promptly delivered, the husband, C. H. Gray, could have taken a train which would leave a half hour later, and have reached Taylors prior to his daughter's interment. He testifies that he would have taken said train. It further appears that the husband, C. H. Gray, after the receipt of the last telegram announcing his daughter's ⁴² death, took the first train that made connection for Taylors.

As already observed, this is the suit of the wife, and the gravamen of the action is the loss to her of the presence and consolation of her husband at the daughter's funeral.

Among other pleas filed by the defendant company was the following, to wit: "That the telegram, about the delivery of which complaint is made, was filed at one of its [the company's] offices

in the state of Mississippi, and the contract for the transmission and delivery of said telegram was made and entered into by the parties to the contract in the state of Mississippi, and in reference to the laws of said state, and defendant avers that, according to the laws of Mississippi, under which the contract was made, the plaintiff has no right of action to recover the damages sued for." Plaintiff's counsel demurred to this plea, because immaterial and insufficient in law, but the demurrer was overruled. Plaintiff then filed the following replication to said plea, to wit: "She admits the delivery of the telegram to defendant at one of its offices in the state of Mississippi, and that the contract for the transmission and delivery of said telegram was made in the state of Mississippi, and, according to its laws, she would have no right of action to recover the damages sued for, but she denies that the contract for the transmission and delivery ⁴³ of said telegram was entered into in reference to, and to be governed by the laws of, said state, further than the confines of the state of Tennessee, and in which latter state the default sued for is shown to have occurred." Defendant moved to strike out this replication, but the motion was overruled. At a subsequent term, plaintiff, reserving her exceptions, by leave of the court, filed an additional replication to the fourth plea, viz.: "That her cause of action herein arises under the statutes and laws of Tennessee, and not under the laws of Mississippi, and that in the making of the original contract for the transmission and delivery of said telegram, she did not waive or renounce any rights afforded her by the laws of Tennessee, and for this reason she should not be prejudiced by the laws of Mississippi." Issue was joined on this replication.

The court charged the jury, among other things, as follows: "If the proof shows the message not delivered in a reasonable time, and that plaintiff's husband on that account failed to go to the plaintiff, and that he would have gone if the message had been promptly delivered, and that plaintiff was, in consequence thereof, deprived of his sympathy and consolation during the daughter's illness or at the funeral, you should find for the plaintiff, and award her nominal damages—that is, a small sum of a few cents, so as to carry the costs against the defendant. But the contract, ⁴⁴ undertaking or agreement, having been entered into in the state of Mississippi for the transmission and delivery of the message, which, as alleged in the plaintiff's declaration, was partly performed in that state, the liability of the defendant for failure to promptly deliver it, or for negligence

for delay in its delivery to the sendee in Tennessee, is governed by the laws of Mississippi, and under the laws of that state no recovery can be had for mental anguish merely, and that being the only injury complained of in this suit, you should award no damages for mental anguish."

Counsel for plaintiff then submitted four supplemental instructions, which he asked to be given in charge to the jury, which requests were declined by the court. The substance of said request was that if defendant company breached its statutory duty as defined by the laws of Tennessee, after the message was received at Dayton, Tennessee, by failing to promptly deliver it, that plaintiff could recover such damages as were the direct and proximate result of the company's breach of duty.

The errors assigned are: 1. The court was in error in refusing to strike out the fourth plea filed by defendant; 2. It was error to charge the jury that plaintiff was only entitled to nominal damages; 3. Because the laws of Mississippi did not govern and control defendant's liability in this case under the facts; 4. Because ⁴⁵ the statement of the judge that the jury should find "a small sum of a few cents," was an infringement of the province of the jury and equivalent to directing a verdict; 5. The court should have given in charge the four requests submitted by plaintiff's counsel, to the effect that the statutes of Tennessee, and not the laws of Mississippi, determined the defendant's liability, and that if default occurred in delivery of the message after it reached Dayton, plaintiff should recover such damages as were the legitimate, proximate, and direct result of defendant's default.

The argument in support of the instructions given by the circuit judge to the jury proceeds upon the assumption that the plaintiff's right of action is *ex contractu*, and based upon an agreement entered into and partly performed in the state of Mississippi. The corollary is then propounded that such a contract must be governed by the laws of Mississippi in existence at that time, and since the laws of that state exonerate the telegraph company from liability for mental anguish, occasioned by the failure to promptly transmit and deliver electrical messages, there can be no recovery in this case. It is conceded in argument that such is the law of Mississippi, although the rule is otherwise in the state of Tennessee: *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695, 6 Am. St. Rep. 864, 8 S. W. 574.

Counsel cites numerous authorities to show that ⁴⁶ in a case like this, the Mississippi law must control. In *Scudder v.*

Union Nat. Bank, 91 U. S. 412, 413, it was said by the United States supreme court that "matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitations, depend upon the law of the place where the suit is brought": *Hubble v. Morristown Land etc. Co.*, 95 Tenn. 585, 32 S. W. 965.

In the case of *Liverpool etc. Steamship Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. Rep. 469, Mr. Justice Gray, after a thorough review of the principal cases, English and American, on this subject, said that, according to the great preponderance, if not the uniform concurrence, of authority, the general rule is that the nature, the obligation, and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view. Accordingly, it was held in that case that a contract of affreightment executed in New York, between citizens or residents of that state, for the shipment of goods to Liverpool, is an American, and not an English contract, and so far as concerns ⁴⁷ the obligation to carry the goods in safety, is to be governed by American law: 2 *Parsons on Contracts*, Eng. ed., 578; *Southern Ry. Co. v. Harrison*, 119 Ala. 539, 72 Am. St. Rep. 936, 24 South. 552.

In *Hazel v. Chicago etc. Ry. Co.*, 82 Iowa, 477, 48 N. W. 926, it appeared that goods were shipped from Dakota to Iowa under a contract limiting liability, which contract was void under the laws of Iowa, but valid where made. The goods were lost in Iowa, but recovery was denied because of the limitation of liability contained in the contract of shipment. The supreme court said, viz.: "It is a fundamental rule, and one of almost universal application, that in case of a conflict of laws concerning a private contract, the law of the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract, unless it be shown by the contract, or fairly inferable therefrom, that the parties intended that the law of another state or country should control their rights. In this case," said the court, "the parties contracted under the laws of Dakota, and the fact that such a contract is void in this state [Iowa] shows that it was intended that our laws should not have any application to their contract."

In *Reed v. Western Union Tel. Co.*, 135 Mo. 674, 58 Am. St. Rep. 616, 37 S. W. 904, it appeared that a suit was brought in Missouri by the addressee of a telegram sent from Iowa. The court said, viz.: ⁴⁸ "Both parties to this agreement for the transmission of the message resided in Iowa. The tariff was paid and the defendant entered upon the performance of the contract in that state. The statute and laws of Iowa were therefore pertinent and admissible, and determined the effect of the contract": See *McDaniel v. Chicago etc. Ry. Co.*, 24 Iowa, 416.

In *Hubble v. Morristown Land etc. Co.*, 95 Tenn. 589, 32 S. W. 965, we held that "the validity of the contract, the obligation of the parties, its character and extent, are to be settled by the law of the place where the contract was made, or to be performed. . . . If the contract is made in one place, and it is agreed to be performed in another place, the law of the place of performance, instead of the *lex loci contractus*, will govern the contract." In that case it was held that a note secured by mortgage on Tennessee land for a loan negotiated in Connecticut, executed in North Carolina, but delivered and made payable in New Jersey, was, in the absence of any different understanding between the parties, governed by the laws of New Jersey in respect to usury.

In *Coghlan v. South Carolina R. R. Co.*, 142 U. S. 101, 12 Sup. Ct. Rep. 150, it was held that contracts made in one place, to be executed in another, are, as a general rule, to be governed by the law of the place of performance. It was accordingly held that bonds of a railroad company in South Carolina, ⁴⁹ which are redeemable, and are to be wholly performed in England, bear interest after maturity, according to the law of England: See, also, *Hall v. Cordell*, 142 U. S. 116, 12 Sup. Ct. Rep. 154.

These authorities are very instructive upon the proposition submitted by counsel, and probably controlling in this case, if the remedy of plaintiff was alone upon the contract. But we have in this state a statute which has been construed by this court to provide an additional remedy. It declares that "all other messages, including those received from other telegraph companies, shall be transmitted in the order of their delivery, correctly and without unreasonable delay, and shall be kept strictly confidential": Shannon's Code, sec. 1837.

"Any officer or agent of a telegraph company who willfully violates either of the provisions of the preceding section is

guilty of a misdemeanor, and the telegraph or telephone company is liable in damages to the party injured": Shannon's Code, sec. 1838.

Construing this statute in *Western Union Tel. Co. v. Mellon*, 96 Tenn. 72, 33 S. W. 725, we held that under our statute, allowing a right of action to the party aggrieved, it was not necessary that any contractual relation should exist, but the company is liable for a breach of its statutory duty independent of any contract. The breach of the statute, in failing to deliver the message, entitled the party aggrieved to at least nominal damages,⁵⁰ to which may be added compensatory or exemplary damages, in the discretion of the jury. In that case we quoted with approval Mr. Thompson on the Law of Electricity, section 427, in which it is said, viz.: "The true view which seems to sustain the right of action in the receiver of the message, or in the person addressed, when it is not delivered, is one which elevates the question above the plane of mere privity of contract, and places it where it belongs, upon the public duty which the telegraph company owes to any person beneficially interested in the message, whether the sendee or his principal, where he is agent, or the receiver, or his principal, where he is agent." We are of opinion, therefore, that plaintiff is an aggrieved party within the meaning of the act, and as such is entitled to maintain an action against the defendant company for the breach of a public duty. It is wholly immaterial that this message was sent from another state, and that plaintiff is seeking to recover for the failure to deliver such a message. In *Western Union Tel. Co. v. James*, 162 U. S. 651, 16 Sup. Ct. Rep. 934, it appeared that the state of Georgia had passed a statute prescribing a penalty of one hundred dollars against telegraph companies failing to transmit and deliver dispatches with due diligence. A cotton merchant in Georgia brought suit against the Western Union Telegraph Company to recover the statutory penalty for failing to deliver with due diligence a⁵¹ message sent to his address by a cotton merchant residing in the state of Alabama, which default resulted in damage to the plaintiff. Said the court, viz.: "The only question, therefore, before the court is whether the statute of the state of Georgia, providing for the recovery of such penalty, is a valid exercise of the power of the state in relation to messages by telegraph from points outside, and directed to some point within, the state of Georgia." The court held that such a statute is not an unconstitutional interference with interstate commerce, as applied to interstate messages,

in the absence of any legislation by Congress on the subject. Said the court: "The statute in question is of a nature that is in aid of the performance of a duty of the company that would exist in the absence of any such statute, and is in no wise obstructive of its duty as a telegraph company. It imposes a penalty for the enforcement of this general duty of the company. . . . Can it be said that the imposition of a penalty for the violation of a duty which the company owed by the general law of the land is a regulation of, or an obstruction of, interstate commerce within the meaning of that clause of the federal constitution? We think not. . . . We see no reason to fear any weakening of the protection of the constitutional provision as to commerce among the several states by holding that in regard to such a message as ⁵² the one in question, although it comes from a place without the state, it is yet under the jurisdiction of the state where it is to be delivered (after its arrival therein at the place of delivery), at least so far as legislation of the state tends to enforce the performance of the duty owed by the company under the general law."

It will be observed that the Tennessee statute provides no penalty for its infraction, but the violation thereof is declared a misdemeanor, and a right of action is expressly given the aggrieved party for all damages sustained. Plaintiff, as the party aggrieved, is entitled to sue in this state for breach of the statute.

It is insisted, however, that whatever action plaintiff might have brought by virtue of the code provision, she has not started such suit, but is suing upon the contract made with the company in Mississippi. In *Western Union Tel. Co. v. Mellon*, 96 Tenn. 72, 33 S. W. 725, we held that such an injury might be redressed upon a statement of the facts of the case. If the statute prescribed a specific penalty for its violation, and the suit was brought to recover that penalty, it would be necessary to declare on the statute.

The declaration herein, in setting out the facts, recites the contract, but the statement of the cause of action is not distinctively *ex contractu*, and is sufficient for relief under the statute.

⁵³ It is insisted, however, that the mental suffering claimed to have been sustained by the wife on account of the absence of her husband from the funeral was not the proximate consequence of the failure to deliver the telegram, since the telegram sent by the wife only conveyed intelligence of the daughter's illness. Again, it is insisted that the proof shows that the hus-

band would not have departed for Taylors had he received the message on Sunday, since the telegram to his wife on the following day advised his wife that unless his daughter was dangerously sick, he could not go until the first of the month.

We do not pass upon these questions upon this record, but for the errors in the charge of the court on the subject of the contract, and his refusal to charge as requested, the judgment is reversed and the cause remanded.

CONFLICT OF LAWS AS TO MEASURE OF DAMAGES.*

I. Scope of Note.

II. Breach of Contract.

a. As Between Law of Place of Making and Law of Place of Performance.

1. Contracts in General.

A. General Rule.

B. Effect of *Lex Loci Rei Sitae*.

C. Where Place of Making is also Place of Part Performance.

2. Negotiable Instruments.

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B. Where Secured by Property Situated in Foreign State.

b. Effect of *Lex Fori*.

1. In General.

2. Breach of Contract.

A. Cases in Which Forum is Different from Place of Making and of Performance.

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(1) Cases Rejecting *Lex Fori*.

(2) Cases Applying *Lex Fori*.

C. Bond Given in One Court Sued on in Another.

III. Torts.

a. Where Based upon Relation of Contract Inter Partes.

b. Conflict Between Law of Place of Injury and of Forum.

*REFERENCES TO MONOGRAPHIC NOTES.

When transitory causes of action may not be prosecuted in a foreign state or country: 59 Am. St. Rep. 859-885.

Enforcement of contract outside of jurisdiction where made: 55 Am. St. Rep. 774-778.

Action in one state to enforce cause of action created by the statutes of another: 14 Am. St. Rep. 850-855.

Actions, when local and when transitory: 22 Am. St. Rep. 22-27.

Conflict of laws as to usury: 46 Am. St. Rep. 201, 202.

Enforcement in other states of the personal liability of stockholders: 27 Am. St. Rep. 168-175.

Asserting against a married woman a liability to which she is subject in the state where it was created, but not in the state where she is sued: 46 Am. St. Rep. 448-457.

1. In Determining Whether Action is Maintainable.
 - A. General Rule.
 - B. Where Subsequent Suits for Same Tort Allowed by *Lex Loci Delicti*.
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2. In Fixing Measure of Damages.
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IV. Interest as Damages.

- a. In General—Distinction Between Conventional and Moratory Interest.
- b. Conflict as Between Law of Place of Making and of Place of Performance of Contract.
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 2. Promissory Notes.
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 - A. Weight of Authority—Law of Place Where Judgment is Rendered Controls.
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3. Domestic Judgment on Foreign Cause of Action.
4. Contracts in General.
 - A. Weight of Authority—*Lex Fori* does not Control.
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5. Negotiable Instruments.
 - A. Promissory Notes.
 - (1) Weight of Authority.
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 - (3) Where Payable Generally.
 - B. Corporate and Municipal Bonds, etc.
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7. Review of Cases as to.
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 1. Foreign Law not a Subject of Judicial Notice.
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 - A. View that no Interest is Allowable.
 - B. View that Common Law Prevails.

C. View that Domestic Law Governs.**f. Statutory Provisions.****I. Scope of Note.**

In the following note no attempt will be made to treat of the conflict of laws in relation to the validity or effect of such contractual provisions as may affect the measure of damages. Such are provisions for interest, which involve questions of usury, stipulations limiting liability on a contract in case of breach, or for attorneys' fees in the event of suit, etc. The validity and effect of these and similar provisions is dependent upon the same principles as govern the validity and effect of contracts generally where a conflict of laws arises. The object of this note is rather to determine by the law of what place the rule for computing damages is fixed where suit is brought in one jurisdiction on an obligation incurred under, or in some way affected by, the law of another jurisdiction, than to consider the validity or effect of contractual provisions, although they may, in some cases, affect the amount of recovery.

II. Breach of Contract.**a. As Between Law of Place of Making and Law of Place of Performance.****1. Contracts in General.**

A. General Rule.—Where a contract is entered into in one place to be performed in another, as between these two jurisdictions, the rule and the measure of damages, in the event of the contract being breached, is fixed by the law of the latter jurisdiction. This principle, if not the necessary result of, is at least derived by analogy from, the principle that the validity, interpretation and effect of a contract is to be governed by the law which the parties thereto had in view in executing it, and which when the place of performance differs from the place of execution, is presumed, in the absence of express stipulation otherwise, to be the law of the place of performance (*lex loci solutionis*). The consequences which are to flow from a breach of a contract are a very important element in determining the "effect" of a contract, and it is accordingly held that the law which the parties are presumed to have fixed upon as determining the effect of a contract while it remains in force shall likewise determine the consequences which follow its breach.

Thus, in *Sandham v. Grounds*, 94 Fed. 83, 36 C. C. A. 103, an action was brought against the administratrix of the estate of a decedent for the breach of a contract, entered into between the plaintiff and the defendant's intestate that the latter would adopt plaintiff (who was his niece), bring her to America from Ireland, and leave her one-half his property on his death. The contract of adoption was to be performed in the state of Pennsylvania. Plaintiff was not adopted by the decedent, and he dying intestate, she

did not receive the property he had contracted to leave to her. The court held that the damages recoverable were to be determined by the laws of the state of Pennsylvania where the contract was to be performed and the assets of decedent's estate were distributable. So where a contract was made in Pennsylvania to carry plaintiff and his baggage over a road lying entirely in New Jersey, the law of the latter state was held to control the mode of fulfilling the contract and the measure of recovery for its breach, being the *lex loci solutionis*: *Brown v. Camden etc. R. R. Co.*, 83 Pa. St. 316.

B. Effect of *Lex Loci Rei Sitae*.—In *Tillotson v. Prichard*, 60 Vt. 94, 6 Am. St. Rep. 95, 14 Atl. 302, an action was brought in Vermont for a breach of a covenant of warranty in a deed of land situated in Minnesota, where the domicile of the grantor was in Vermont and that of the grantee in New Hampshire. Taft, J., speaking for the court says: "The contract being one which could only be performed in Minnesota, the parties evidently had in view the law of that state in reference to its execution. We think its construction and force, including the rule as to damages, must be governed by the law of that state: 2 Kent's Commentaries, 459. 'The law of the place where performance is to occur governs, in respect to the validity and performance of contracts made in one state, but to be performed in another': Rorer on Interstate Law, 50. . . . The plaintiff claims damages under the rule in this state, viz., the value of the premises at the time of the eviction. The referee makes no finding of what the law of Minnesota is. It should have been found as a fact." In *Looney v. Reeves*, 5 Kan. App. 279, 48 Pac. 606, an exactly opposite conclusion is reached. The action in that case was for the breach of a covenant of warranty in a deed executed in Kansas, the land conveyed being situate in Missouri, and the claim that the law of the latter state should control was thus briefly dismissed by the court. "In answer to the first question raised by the plaintiff in error, we need only to state that the deed containing the covenant of warranty was executed in this state, and the covenantee is here seeking to recover for a breach of such covenant. The damages in such case must be computed according to the law of this state." For the law controlling the measure of damages where a promissory note made or payable in one state is secured by a mortgage on land in another jurisdiction, see *Guignon v. Union Trust Co.*, 156 Ill. 135, 47 Am. St. Rep. 186, 40 N. E. 556; post, II, a, 2, B.

C. Where Place of Making is also Place of Part Performance.—If a contract is to be partly performed in the same jurisdiction as that in which it is entered into, the law of that jurisdiction fixes the measure of damages, and it is immaterial that it is also to be partially performed elsewhere. Thus, in *Reed v. Western Union Tel. Co.*, 135 Mo. 661, 58 Am. St. Rep. 609, 37 S. W. 904, a telegraph message was sent from a point in Iowa to a point in Missouri, and

an action having been brought in the latter state for its negligent and erroneous transmission, it was urged that the law of Iowa was wrongly admitted in evidence, but the court held that the contract having been there made and to be partially performed, the circumstance that it was also to be partly performed in Missouri did not take it out of the operation of the Iowa statute relating to damages recoverable for negligence in its performance. This case is among those cited in the principal case (*Gray v. Telegraph Co.*, 108 Tenn. 39, ante, p. 706, 64 S. W. 1063) as probably controlling if the remedy of plaintiff was alone upon the contract. The principal case goes off on the ground that by a statute of Tennessee, the place to which the message was sent, the defendant telegraph company was rendered liable for failure to deliver a message in that state, wherever the contract for its transmission was entered into, and even, it seems, though no contractual relation existed. The language of the court leaves little ground for doubt, however, that had the liability of the defendant rested on its breach of contract with plaintiff, the law of Mississippi, where the contract was executed and partially performed, would control.

On the same principle it was held in *Dyke v. Erie Ry. Co.*, 45 N. Y. 113, 6 Am. Rep. 43, that where a railroad ticket was bought at one point within the state of New York for transportation to another point within the same state, the fact that the contract was breached and the purchaser injured by the defendant's negligence, while on a portion of the latter's road which was situated in Pennsylvania, did not render the law of New York the less controlling in respect to the measure of damages recoverable. "The duty and obligation of the defendant in the performance of the contracts commenced and ended within the state of New York. Although the route and line of the defendant's road between the places at which the plaintiffs took their passage and their destination passed through portions of the states of Pennsylvania and New Jersey, by the consent of those states respectively, the parties cannot be presumed to have contracted in view of the laws of those states. The contracts were single and the performance one continuous act."

2. Negotiable Instruments.

A. General Rule.—The same principles as are above laid down with respect to contracts generally control where the contract involved takes the form of a promissory note, bill of exchange, or other negotiable instrument. As between the place where the instrument is executed (*lex loci contractus*), and that in which payment is to be made (*lex loci solutionis*), the law of the latter jurisdiction is the one by which the measure of damages is to be ascertained. The place where the note or bill is payable does not, however, necessarily fix the place at which the contract of every party thereon is to be performed. Thus, a bill of exchange drawn on a party in Washington, D. C., by a party in Alabama is payable

in Washington. The liability of the drawer is, however, determinable not by the law of the place where the drawee, if he accepts, is bound to pay, but by the place where the drawer himself is bound to perform his contract. "The contract of a drawer of a bill of exchange is not a contract to pay the sum of money named in it, at the place upon which it is drawn; it is only a contract that the bill shall be accepted and then paid by the drawee; and further, for the payment of the sum of money, and such other sum as will indemnify the holder, if it is not accepted or not paid, and is protested and notice duly given. [Citing Story on Bills, secs. 107, 114, 118.] And this indemnity is governed by the law of the place where the bill is drawn, and not that of the place where it is made payable [Story on Bills, sec. 176, note 2, sec. 177]": *Crawford v. Branch Bank at Mobile*, 6 Ala. 12, 46 Am. Dec. 33.

In the case from which this quotation is made, it was held that the drawer of a bill in Alabama on a party in the District of Columbia was responsible on the protest of the bill to the ten per cent damages fixed by the statutes of Alabama where a bill drawn on parties outside the state was protested. Statutes of this nature are by no means uncommon, and in their application the courts uniformly hold that the law of the place where the bill is drawn is, so far as concerns the liability of the drawer, the *lex loci solutionis*, and furnishes the measure of the damages recoverable from him. If, by the law of that place, the drawer of a bill of exchange on persons outside the state, which bill is protested, becomes liable for statutory damages, he is so responsible, regardless of where the bill is made payable: *Crawford v. Branch Bank at Mobile*, 6 Ala. 12, 41 Am. Dec. 33; *Crawford v. Branch Bank at Decatur*, 6 Ala. 574; *Cullum v. Casey*, 9 Port. (Ala.) 131, 33 Am. Dec. 304; *Price v. Page*, 24 Mo. 65; *Page v. Page*, 24 Mo. 595; *Shipman v. Miller*, 2 Root (Conn.), 405; *Bank of New Orleans v. Stagg*, 1 Handy (Ohio), 382; *Allen v. Union Bank*, 5 Whart. (Pa.) 420; *Hazlehurst v. Kean*, 4 Yeates, 19; *Bank of United States v. United States*, 2 How. 711. Compare, also, *Kuenzi v. Elvers*, 14 La. Ann. 391, 74 Am. Dec. 434. So it was held in *Pomeroy v. Slacum*, 1 Cranch C. C. 578, Fed. Cas. No. 11,262, and on writ of error to supreme court of United States in *Slacum v. Pomery*, 6 Cranch, 221, that the law of Virginia, rendering the drawer or indorser of a bill of exchange which is protested liable for fifteen per centum damages thereon, determined the liability of one who indorsed in that state a bill of exchange drawn in the island of Barbadoes upon a firm in Liverpool, England.

B. Where Secured by Property Situated in Foreign State.—If a note made and payable in one state is secured by a mortgage on lands situated in another jurisdiction, the measure of damages allowed on the foreclosure of the mortgage is to be determined by the law of the place in which the note is payable, rather than by

that of the jurisdiction in which the land mortgaged as security therefor is situated. Thus, in *Guignon v. Union Trust Co.*, 156 Ill. 135, 47 Am. St. Rep. 186, 40 N. E. 556, affirming 53 Ill. App. 581, where notes made and payable in Missouri were secured by lands in Illinois, it was held that in a suit to foreclose, the damages recoverable included four per cent damages as allowed on a protested note by the statutes of Missouri. The notes being payable in the latter state were held governed by its laws as to the damages recoverable for its breach.

b. Effect of *Lex Fori*.

1. *In General*.—The cases so far considered have been discussed without any reference to the effect of the law of the place in which suit is brought in determining by what law the measure of damages is to be fixed. The “conflict” of laws has up to this point, been treated only so far as it exists between the law of the place in which the contract is entered into (*lex loci contractus*), that of the place where the contract is to be performed (*lex loci solutionis*), and in cases where real property situated outside one or the other of these jurisdictions is involved, the law of the place where the property is situated (*lex loci rei sitae*). Very frequently, however, the conflict involves still a fourth factor—the law of the forum in which the action is brought (*lex fori*).

In theory, the function of the *lex fori* is quite sharply defined and very well settled. It controls the remedy. By whatever law the substantive rights of litigants may be determinable, no court is called upon by comity to forsake its methods of administering relief and adopt those of one or many foreign states. “Each nation is at liberty to adopt such forms and such a course of proceeding as best comport with its convenience and interests, and the interests of its own subjects, for whom its laws are particularly designed. The different kinds of remedies and the modes of proceeding best adapted to enforce rights and guard against wrongs in any nation, must materially depend upon the structure of its own jurisprudence. . . . All that any nation can, therefore, be justly required to do, is to open its own tribunals to foreigners in the same manner and to the same extent as they are open to its own subjects and to give them the same redress as to rights and wrongs which it deems fit to acknowledge in its own municipal code for natives and residents”: *Story on Conflict of Laws*, 8th ed., sec. 557. Is, then, the measure of damages recoverable for the breach of a contract or the infliction of a wrong, a matter of remedy merely, or is it an element of the substantive rights of the litigants? If the former, the *lex fori* is properly applicable. If the latter, the *lex fori* can no more properly determine the measure of recovery than it can determine the validity of the contract or other cause of action for which remedy is sought.

2. *Breach of Contract*.—The cases which involve the effect of the *lex fori* in determining the measure of damages recoverable for

a breach of contract do not, in the majority of instances, contain any discussion of the question. In many the question discussed by the courts is whether the *lex loci contractus* or the *lex loci solutionis* controls, and the opinion of the court as to the applicability, or, rather, inapplicability of the *lex fori* is derivable only from the fact that the latter is not considered at all. In others, the action is brought in the place where the contract was made or was to be performed, and if the law of the forum is held to control, the language of the opinion alone indicates whether it is applied because it is the law of the forum, or because it is the law of the place where the contract was made or to be performed.

A. Cases in Which Forum is Different from Place of Making and of Performance.—The cases in which the question of the effect of the *lex fori* upon the measure of damages is flatly presented are those in which the action is brought in a place different from that in which the contract was made or to be performed. Whatever influence the law of the forum exercises in such a case it exercises because it is the law of the forum, and not because it is at the same time the *lex loci contractus*, the *lex loci solutionis* or the *lex loci rei sitae*. Such a case is *Roe v. Jerome*, 18 Conn. 138. There a bill of exchange was drawn, accepted, transferred and made payable in the state of New York. The acceptance had been obtained by fraud and without consideration, but the holder took it bona fide and without knowledge of the fraud, and the question arose whether recovery should be had according to the law of New York, by which the holder could recover only what he had actually paid for the bill, or according to the law of the forum, Connecticut, by which the face value of the bill was recoverable. The opinion of Williams, C. J., which was concurred in by the majority of the court, first disposed of the view that the general commercial law, as laid down by the supreme court of the United States, controlled, by the statement that comity requires that the decisions of each state shall be taken to settle the common law in that state. The opinion then continues: "But it is said that this is not a question to be regulated by the laws of New York any more than the damages in an action of trover, in which case, though the property was converted in the state of New York, we should not go there for the rule of damages. But it seems to the court that the damages in this case are part of the law of the contract itself. Were the question what interest the plaintiff should recover, or what was the rule of damages on a protested bill, we should look to the state where the contract was made and to be performed (citing *The Philadelphia Loan Co. v. Towner*, 13 Conn. 249, 257). And we do not see why that principle should not be applied to this case.

"The plaintiff, residing in New York, purchased of a man in New York this bill; and by the laws of that state, under certain circum-

stances, he shall recover no more than he has paid for it. We do not see why that is not as much a part of the law of the contract as the rate of interest in the other case. In each case the law of the state has said how the violation of the contract shall be punished—in other words, what shall be a compensation to the party aggrieved; and the party who buys a note or bill is supposed to be as cognizant of the law in the one case as the other. Had the rule been settled by statute in the one case as in the other, it would seem to us that there could be no possible difference in the cases; nor can we see how the fact that one is settled by the courts can change its effect or operation. In both cases it seems to us a part of the law of the contract; and if upon that contract the plaintiff could in his own state recover only what he paid, we do not think he ought to recover more by coming into this state for his remedy."

A very similar state of facts as that upon which the opinion quoted is based existed in *Brush v. Scribner*, 11 Conn. 388, 29 Am. Dec. 303, but in that case, while it was conceded that the law of New York properly governed the measure of damages recoverable, the supreme court of Connecticut refused to apply it on the ground that the question not having been raised in the court below, or the claim made there that the law of New York controlled, the judgment would not be reversed on that ground. In *Allen v. Union Bank of Louisiana*, 5 Whart. (Pa.) 420, an action was brought in Pennsylvania against the drawers of a bill of exchange drawn in New Orleans upon a firm in New York. The law of Louisiana giving ten per cent damages against the drawers and indorsers of a protested bill of exchange was held to be the law applicable, rather than the law of the forum.

B. Cases where Forum is the Same as Place of Making or of Performance.

(1) **Cases Rejecting Lex Fori.**—In another class of cases the *lex fori* is denied any effect in determining the measure of damages recoverable, although the place of the forum is coincident with the *lex loci contractus* or the *lex loci solutionis*. Theoretically, and so far as the result of these cases is concerned, they are even stronger authority for the view that the *lex fori* does not control than are those just considered in which the law of the forum is involved in the case only because of the locus of the action. As a matter of fact, however, their value as authority for this doctrine is greatly weakened by the fact that but little or no attention is paid in the opinions to the effect of the *lex fori* as such, the discussion usually concerning the conflict between the *lex loci contractus* and the *lex loci solutionis*, or between one of these and the *lex loci rei sitae*. Such, for instance, are the cases in which an action is brought against the drawer of a protested bill of exchange in the place where the bill itself is payable, and the damages recoverable are held to be those assessed by the law of the place where the bill

was drawn, it being the place where the contract of the drawer is to be performed: *Price v. Page*, 24 Mo. 65; *Page v. Page*, 24 Mo. 695; *Hazlehurst v. Kean*, 4 Yeates, 19. Similarly, in *Guignon v. Union Trust Co.*, 156 Ill. 135, 47 Am. St. Rep. 186, 40 N. E. 556, affirming 53 Ill. App. 581, the law of Missouri was held to govern the damages allowed on the protest of a note made and payable in that state, although the suit was brought in the courts of Illinois to foreclose lands situated within the limits of Illinois. So in *Tillotson v. Prichard*, 60 Vt. 94, 6 Am. St. Rep. 95, 14 Atl. 302, where the place of execution of the deed and the forum were both in Vermont, it was, nevertheless, held that the law of Minnesota determined the measure of damages in an action for the breach of a covenant of warranty in a deed to land situated in that state, Minnesota being regarded by the court as the place of performance. See, also, as an instance of the application of the law of another state, where the law of the forum was also that of the place where the contract was to be partially performed: *Reed v. Western Union Tel. Co.* 135 Mo. 661, 58 Am. St. Rep. 609, 37 S. W. 904.

(2) *Cases Applying Lex Fori.*—The result of the cases in which the courts have applied the law of the forum in determining the rule or measure of damages for a breach of contract, however paradoxical it may seem, is to quite conclusively indicate that the *lex fori*, as such, is not, in the view of those courts, the law properly applicable. In all of these cases the place where the action was brought was the same as that in which the contract was made or was to be performed, and the law of that place was applied rather because it was the *lex loci contractus* or the *lex loci solutionis* than because it was the law of the forum. In most cases the circumstance that it was the law of the forum is not adverted to at all, and the undoubted implication is that merely as the *lex fori* it exerts no influence whatever in determining the measure of damages for the breach of the contractual obligation. Such, for instance, are the cases in which damages on a protested bill of exchange were allowed against the drawer or indorser of the bill, in accordance with the law of the place of drawing or indorsing, that place being the same as that of the forum: *Crawford v. Branch Bank at Mobile*, 6 Ala. 12, 41 Am. Dec. 33; *Crawford v. Branch Bank at Decatur*, 6 Ala. 574; *Bank of New Orleans v. Stagg*, 1 Handy (Ohio), 382; *Bank of United States v. United States*, 2 How. 711; *Slacum v. Pomeroy*, 6 Cranch, 221; *Pomeroy v. Slacum*, 1 Cranch C. C. 578, Fed. Cas. No. 11,262. In *Sandham v. Grounds*, 94 Fed. 83, 36 C. C. A. 103, the law of the forum (Pennsylvania) was also the place of performance. In the principal case (*Gray v. Western Union Tel. Co.*, 108 Tenn. 39, ante, p. 706, 64 S. W. 1063) not only the measure of damages, but the entire cause of action upon which recovery was had, was supplied by a local statute, the breach of which had taken

place in Tennessee, and the plain inference from the language of the court is that if the cause of action had arisen in another state, the law of that state, and not of the forum, would have fixed the elements of damage in an action in Tennessee. In *Loomney v. Reeves*, 5 Kan. App. 279, 48 Pac. 606, the action was one for breach of a covenant of warranty in a deed executed in Kansas and conveying land situate in Missouri. If the decision in the case is correct, which is perhaps doubtful (see *Tillotson v. Prichard*, 60 Vt. 94, 6 Am. St. Rep. 95, 14 Atl. 302), the opinion in holding that the law of Kansas controls the measure of damages rests quite as much upon the fact that the deed was there executed as upon the fact that action was there brought. And so in all of the cases in which the *lex fori* is applied, it was applied, not because it was the *lex fori*, but because it was either the place of contract or of performance, or both: See, in addition to the cases already cited, *Meyer v. Estes*, 164 Mass. 457, 41 N. E. 683; *Dyke v. Erie Ry. Co.*, 45 N. Y. 113, 6 Am. Rep. 43; *Mills v. Dow*, 133 U. S. 423, 10 Sup. Ct. Rep. 413. The law of the forum, as such, does not, it is plainly inferable from these cases, control the measure of damages for breach of contract, where the cause of action arose in a place other than that of the forum.

C. Bond Given in One Court Sued on in Another.—Where a bond is given in a federal court in some legal proceeding therein, and is sued on in a state court, a question arises as to the measure of damages recoverable. In the federal courts, for instance, counsel fees are not recoverable as damages upon an injunction bond, while in the majority of the states they are regarded as properly an element of damages. The question presented is really not so much one of conflict of laws, as whether or not the state courts will, in such a case, adopt the rule of decision obtaining in the federal courts when an injunction bond given in these courts is sued on in a state forum. The uniform holding is that they will not. The reason is thus well expressed in *Mulvane v. Tullock*, 58 Kan. 622, 50 Pac. 897: "The bond executed is in the ordinary form, is in the nature of a contract, and the liability of the obligors depends, not on the federal constitution or a congressional act, but on the proper interpretation of the bond itself. In the absence of a statute fixing the measure of damages or limiting the recovery, we think the bond should be viewed in the light of an independent contract, and is to be interpreted by the general principles of the common law. It is not a mere incident of the injunction proceeding, nor can this, which is an ordinary action at law, be regarded as auxiliary to the proceeding in the federal court. Being an independent contract, actionable in any state court where service upon the sureties can be obtained, the interpretation of the forum applies. As the action on the bond could be brought in a state court—and, indeed, the present action could have been brought in no other—it cannot be

said that the sureties contracted with reference to the view of law taken by the federal courts. They knew that the obligation was enforceable in the courts of the state of which the plaintiff and defendants were all residents, and that the highest court of that state had consistently held that counsel fees were recoverable upon an injunction bond. That the bond was given in a federal court, where a different rule of interpretation obtains, has not been deemed to affect the state court in determining the liability upon such bond when suit was brought thereon." To the same effect are *Mitchell v. Hawley*, 79 Cal. 301, 21 Pac. 833; *Aiken v. Leathers*, 40 La. Ann. 23, 3 South. 357; *Hannibal etc. R. Co. v. Shepley*, 1 Mo. App. 254; *Wash v. Lackland*, 8 Mo. App. 122; *Corcoran v. Judson*, 34 N. Y. 106. See, generally, with respect to attorney's fees as an element of damages, note to *Winkler v. Roeder*, 8 Am. St. Rep. 158-161.

III. Torts.

a. *Where Based upon Relation of Contract Inter Partes.*—In an action *ex delicto*, if there be any conflict of laws as to the measure of damages, it must ordinarily arise between the law of the place where the tort was committed (*lex loci delicti*) and that of the place where the action is brought. There is, however, one class of actions sounding in tort which is based upon a contractual relation, and in these cases the conflict may be further complicated by the injection into it of the law of the place of contract. In *Dyke v. Erie Ry. Co.*, 45 Ill. 113, 6 Am. Rep. 43, a passenger on the line of a New York railroad corporation traveling, from one point in the state of New York to another was injured by the negligence of the company's servants while on a part of its road which was in Pennsylvania. The court held that the law of New York must control as to the amount of damages recoverable, employing the following language: "Whether the actions are regarded as actions of *assumpsit* upon the contracts, or as actions upon the case for negligence, the rights and liabilities of the parties must be judged by the same standard. The form of action concerns the remedy, but does not affect the legal obligations of the parties. In either form of action, the liability of the defendant and the rights of the plaintiffs are based upon the contracts. The defendant owed no duty to the plaintiffs, except in virtue of the contracts, and the obligations for the violation and breach of which an action may be brought are only coextensive with the contracts made. It follows that the law of Pennsylvania cannot enlarge or restrict the liability of parties to a contract, which for its validity, effect and construction is subject to the laws of New York." This case is followed in *Lyons v. Erie Ry. Co.*, 57 N. Y. 489.

A line of cases based upon a very similar theory are those of Indiana, holding that where a contract is made in a state other than Indiana, for the transmission and delivery of a telegram to a point

in Indiana, no recovery can be had in the latter state for the statutory penalty imposed by its laws (Ind. Stats. 1881, sec. 4176) for the failure of a telegraph company to transmit a message as required. The doctrine of these cases is that the right to recover the statutory penalty rests upon the ground that there is a valid contract. "If there must be a contract, then it follows that the breach of duty occurs where the contract is made." If, therefore, the contract of transmission is made outside the state, although it may be for delivery at a point in Indiana, and although the default may be committed in failing to deliver the message after transmission, the courts of Indiana refuse to enforce against the telegraph company the statutory penalty referred to, and leave the party injured to such remedies as are given him by the *lex loci contractus*: *Western Union Tel. Co. v. Reed*, 96 Ind. 195; *Rogers v. Western Union Tel. Co.*, 122 Ind. 395, 17 Am. St. Rep. 373, 24 N. E. 157; *Carnahan v. Western Union Tel. Co.*, 89 Ind. 526, 46 Am. Rep. 175.

The statute of Tennessee, upon which recovery is had in the principal case (*Gray v. Western Union Tel. Co.*, 108 Tenn. 39, ante, p. 706, 64 S. W. 1063), differs from that in the Indiana cases in providing for the recovery of damages sustained, rather than for a penalty, and recovery was, therefore, allowed in the principal case for failure to deliver a message in Tennessee, and under the statute of that state, although the contract for transmission was made and partially performed in Mississippi: See, also, *Telegraph Co. v. Mellon*, 96 Tenn. 66, 33 S. W. 725. Where special damages, rather than a penalty, are allowed by statute, an action for such damages is based on the statute rather than on a contract, and it is accordingly held that under such a statute no contractual relation need exist: See *Western Union Tel. Co. v. McKibben*, 114 Ind. 511, 14 N. E. 897; *Telegraph Co. v. Mellon*, 96 Tenn. 66, 33 S. W. 725. The right of action being independent of the contract, the locus of the contract is immaterial and cannot affect the question of measure of damages recoverable in an action based upon the statute.

b. Conflict Between Law of Place of Injury and of Forum.

1. In Determining Whether Action is Maintainable.

A. General Rule.—Ordinarily, the only conflict of laws as to measure of damages which is met with in actions *ex delicto* is that which arises between the law of the place where the tort was committed and the law of the forum. Which of these, then, determines the elements and the measure of damages?

The class of cases where this conflict is most frequent is that in which recovery is sought in one state for a death by wrongful act in another. Such an action is unknown to the common law, and, where allowed, is based upon statutory enactment. It is, however, held in many, if not in most, jurisdictions, that not only must the law of the place of injury give a cause of action for such an injury, but it must also appear that the statutes of the *lex fori*

permit of such an action, and are not materially different from the foreign statute under the provisions of which recovery is sought. In determining whether or not these statutes are materially different, the courts look to the measure of damages allowed by each. Thus, it is held that the fact that by the laws of one state a higher degree of negligence must be shown to entitle the plaintiff to punitive damages than by the laws of the other, is not such a substantial difference as to prevent an action in the one jurisdiction under the statutes of the other for a death by negligence occurring in the latter state: *Bruce v. Cincinnati R. R. Co.*, 83 Ky. 174. Nor does the fact that the *lex fori* limits recovery for death to a certain sum, while the *lex loci delicti* allows compensatory damages to any extent to be fixed by a jury present such a material difference as to bar an action in the *lex fori*: *Hanna v. Grand Trunk Ry. Co.*, 41 Ill. App. 116. See, also, *Hyde v. Wabash etc. Ry. Co.*, 61 Iowa, 441, 47 Am. Rep. 820, 16 N. W. 351. Apart from the fact that the cases above cited expressly hold that the measure of damages recoverable in such case is determined by the law of the place of injury, and not by the law of the forum, the mere fact that the measure of damages is looked to to ascertain whether the statutes are so substantially different as to prevent recovery in the forum is itself an indication that the *lex loci delicti* must govern as to the measure of damages recoverable, wherever action is brought. Were the view of these courts otherwise, and did the *lex fori* determine the amount of recovery, it is obvious that the law of the place of injury as to the measure of damages would not be a material consideration: *Wooden v. Western New York etc. R. R. Co.*, 126 N. Y. 10, 22 Am. St. Rep. 803, 26 N. E. 1050.

B. Where Subsequent Suits for Same Tort Allowed by Lex Loci Delicti.—In *Mexican Nat. Ry. Co. v. Jackson* (Tex. Civ. App.), 32 S. W. 230, suit was brought in Texas for an injury by negligence, the locus delicti being in Mexico. By the laws of Texas, the rule of damages was compensation for all past and prospective damages from the injury. By the law of Mexico, the plaintiff can recover only damages which have actually accrued at the time of suit, and future damages are left to be recovered as they may accrue. This the court of civil appeals held did not constitute such a substantial difference as to bar recovery in Texas. The view of the court is well expressed by Chief Justice James: "There is no fundamental difference as to the measure of damages. The actual damage the injured party has sustained and will afterward sustain is sought to be arrived at and redressed in both jurisdictions. The end sought in both countries is compensation. The allowance of a new suit for injuries that develop later demonstrates the purpose of the Mexican law to secure to the injured party the right to complete actual damages. The case is not like those in which it appears that the foreign law limits the amount of damages recoverable to a certain sum, where it is held that the domestic court will not render judgment in excess

of that sum. The limit and standard in both countries is compensation, and the power to reduce the allowance in favor of the defendant and the right of a new suit in favor of plaintiff for unconsidered damages, are all merely the means of attaining and enforcing actual damages. . . . Our opinion on this branch of the case is that the difference in the mode of arriving at and administering the damages is a matter that affects the remedy only, and therefore offers no obstacle to the exercise of jurisdiction by our courts: Citing Story on Conflict of Laws, sec. 307d. It was proper to proceed according to our law and practise, as the court did in this instance, in ascertaining the entire damages and awarding execution." This view did not meet the approval of the supreme court, and the judgment of the court of appeals was reversed on a writ of error, the higher court holding that the statutes were too dissimilar to allow of recovery in Texas courts under the law of Mexico: *Mexico National Ry. Co. v. Jackson*, 89 Tex. 107, 59 Am. St. Rep. 28, 33 S. W. 857. The view of the lower court is, however, quoted with approval and followed in *Evey v. Mexican Cent. Ry. Co.*, 81 Fed. 294, 26 C. C. A. 407.

C. Exemplary Damages.—The fact that, according to the law of the place of injury, exemplary damages are allowable for such sum as the court may consider reasonable in view of the social position of the plaintiff, while such damages are not allowed by the *lex fori*, does not, it is held in *Evey v. Mexican Cent. Ry. Co.*, 81 Fed. 294, 26 C. C. A. 407, prevent recovery where no such exemplary damages are prayed for. The court in that case adopts the view of counsel that "the fact that the defendant is sued in a forum where extraordinary damages cannot be recovered is a matter for which he ought to thank Heaven, take courage, and say no more about it." The same view is taken in *Higgins v. Central New England R. Co.*, 155 Mass. 176, 31 Am. St. Rep. 544, 29 N. E. 534. Compare, however, *Mexican Nat. Ry. Co. v. Jackson*, 89 Tex. 107, 59 Am. St. Rep. 28, 33 S. W. 857, reversing 32 S. W. 230.

D. Where *Lex Loci Delicti* is a Penal Statute.—There is no principle better settled than that the courts of one state will not enforce the penal statutes of another. If, therefore, the statutes of the state in which occurred the injury or death which is the subject matter of the action fix a penal sum as recoverable for such death or injury, the courts of another state will not entertain an action for the statutory penalty: *Dale v. Atchison etc. Ry. Co.*, 57 Kan. 601, 47 Pac. 521; *Matheson v. Kansas City etc. Ry.*, 61 Kan. 667, 60 Pac. 747; *Adams v. Fitchburg R. R. Co.*, 67 Vt. 76, 48 Am. St. Rep. 800, 30 Atl. 687. And this rule applies to a federal court (*Lyman v. Boston etc. R. Co.*, 70 Fed. 409), especially when sitting in a state other than that in which the injury occurred: *Marshall v. Wabash Ry. Co.*, 46 Fed. 269.

The question here is not merely one as to whether the courts where the action is brought will give damages to the extent of the penal

sum fixed by the law of the locus delicti. The fact that the statute prescribes a penalty does not merely make that penalty unenforceable in a foreign jurisdiction, but gives to the whole statute the character of a penal enactment, and the courts of another state will not recognize it even as the foundation of an action for compensatory damages: *Dale v. Atchison etc. Ry. Co.*, 57 Kan. 601, 47 Pac. 521. See, also, *Bettys v. Milwaukee etc. R. Co.*, 37 Wis. 323. The mere fact that the statute of the place where the injury was inflicted fixes a maximum limit of recovery does not, however, make it penal: *Higgins v. Central etc. R. Co.*, 155 Mass. 176, 31 Am. St. Rep. 544, 29 N. E. 534; but if the amount recoverable is made dependent on the culpability of the defendant, rather than on the damage sustained by the plaintiff, and allows a minimum sum (five hundred dollars), in any cases where recovery can be had at all, it is held to be penal, and will not be enforced beyond the limits of the jurisdiction in which it was enacted: *Adams v. Fitchburg Ry. Co.*, 67 Vt. 76, 48 Am. St. Rep. 806, 30 Atl. 687. In *Jones v. Fidelity Loan etc. Co.*, 7 S. Dak. 122, 63 N. W. 553, it is held that a demand made in another state on a mortgagee for a discharge of a mortgage does not subject him in case of his refusal to a penalty imposed by the laws of South Dakota for a refusal to give a certificate of discharge of mortgage. In the view of the court, to hold otherwise would be to give the penal laws of South Dakota extraterritorial force, and make them binding upon residents of Iowa while within that state. The statute was, therefore, declared inapplicable, although in addition to being the forum, South Dakota was the place where the mortgage was executed, and the land mortgaged was situated.

2. In Fixing Measure of Damages.

A. Weight of Authority—Lex Loci Delicti Governs.—Upon the question whether the measure of damages for a tort committed in one state and sued on in another is determinable by the law of the forum, or by the law of the place where the tort was committed, the authorities are not entirely harmonious. The great weight of authority, however, supports the doctrine that the *lex loci delicti* controls. The measure of damages is regarded as pertaining to the substantive, rather than to the merely remedial, rights of the injured person. As is said in *Louisville etc. Co. v. Whitlow*, 19 Ky. Law Rep. 1931, 43 S. W. 711, with reference to an action brought in Kentucky to recover damages for the death of plaintiff's intestate in Tennessee: "The law of Tennessee must govern in fixing the liability and the quantum of recovery. It would be strange to apply the law of Tennessee in determining the question of liability, and take the law of the forum to fix the measure of recovery." In the case from which this language is taken, the question was as to the effect of contributory negligence on the part of the decedent. By the *lex loci delicti* (Tennessee), contributory negligence went in mitigation of damages only, while by the *lex fori* (Kentucky), it was a bar to recovery. As has been

seen, the law of Tennessee was applied. Compare *Johnson v. Railroad Co.*, 91 Iowa, 248, 59 N. W. 66, in which the Iowa court refuses to apply to a cause of action arising in Illinois, the rule of comparative negligence of the Illinois courts. This case is disapproved in the Kentucky case above cited: *Louisville etc. Ry. Co. v. Whitlow*, 19 Ky. Law Rep. 1931, 43 S. W. 711.

Similarly, it has been held that the law of the place of injury rather than of the forum determines whether the maximum recovery is limited to a specified sum or not: *Hanna v. Grand Trunk Ry. Co.*, 41 Ill. App. 116; *Northern Pac. Ry. Co. v. Babcock*, 154 U. S. 190, 14 Sup. Ct. Rep. 978. See, also, *St. Louis etc. Ry. Co. v. Brown*, 67 Ark. 295, 54 S. W. 865. So the question whether mental anguish forms a proper element of damages depends upon the law of the place where the cause of action arose: *Railroad Co. v. Graham*, 98 Ky. 688, 34 S. W. 229; as does also the right to recover exemplary or vindictive damages: *Illinois Cent. Ry. Co. v. Crudup*, 63 Miss. 291; *Pullman Palace Car Co. v. Lawrence*, 74 Miss. 782, 22 South. 53. See, also, *Bruce v. Cincinnati R. Co.*, 83 Ky. 174.

In *Kiefer v. Grand Trunk Ry. Co.*, 12 App. Div. 28, 42 N. Y. Supp. 171, affirmed in 153 N. Y. 688, 48 N. E. 1105, it was held that where a death occurred in Canada, damages for which were sought to be recovered in the courts of New York, the provisions of the statute of the latter state, which authorized interest on the amount of the judgment from the time of death to the time of the rendition of the judgment, was inapplicable. The court regarded the provision for interest as not merely remedial, but as creating a new right and liability, and, therefore, part of the substantive law of the state (citing *O'Reilly v. Stage Co.*, 87 Hun, 406, 34 N. Y. Supp. 358, approved in *Isola v. Weber*, 147 N. Y. 329, 41 N. E. 704). This being so, it was held that the rights of the plaintiff must be determined by the laws of Canada, where her cause of action arose, and the provision of the New York statute allowing interest from the time of death, not being a mere matter of remedy, could not be applied to increase the measure of recovery allowed here by the *lex loci delicti*: See, however, *Wooden v. Western etc. R. Co.*, 126 N. Y. 10, 22 Am. St. Rep. 803, 26 N. E. 1050, in following section, as to the law in New York.

B. Contrary Doctrine.—As has been suggested, some of the cases take a view quite different from that of the authorities just considered, and regard the *lex fori* as determinative of the elements and measure of damages. Thus, in *Higgins v. Central New England R. Co.*, 155 Mass. 176, 31 Am. St. Rep. 544, 29 N. E. 534, it is held that, while an action may be brought in Massachusetts for a death by wrongful act which occurred in Connecticut, and which gives rise to a cause of action by a statute of the latter state, such statute not being materially different from that of Massachusetts, the rules of the forum must govern in fixing the elements of damage recover-

able, and hence exemplary damages and the expenses of suit, though recoverable by the law of Connecticut, cannot be recovered where recovery is sought under that law in the courts of Massachusetts.

So, in *Wooden v. Western New York etc. R. R. Co.*, 126 N. Y. 10, 22 Am. St. Rep. 803, 26 N. E. 1050, it is said in reference to an action on a Pennsylvania statute, where the law of New York limited damages for death to five thousand dollars, while the law of Pennsylvania imposed no restriction: "That restriction pertains to the remedy rather than to the right: *Demick v. Central R. R. of New Jersey*, 103 U. S. 11. It is a limitation upon the discretion of the jury in fixing the amount of damages, but not upon the right of action, or its inherent elements or character. The restriction indicates our public policy as to the extent of the remedy, and the plaintiff who chooses to avail herself of our remedial procedure must submit to our remedial limitations, and be content with a judgment beyond which our courts cannot go. They cannot exceed it in a case arising here, and no principle of comity requires them to enlarge the remedy which the plaintiff voluntarily seeks." After stating that there may possibly be a different rule where the defendant is not a domestic corporation, the court concludes: "The difference between the two statutes, therefore, does not strictly affect the rule of damages, but rather the extent of damages, and that extent, as limited or unlimited, does not enter into any definition of the right enforced, or the cause of action permitted to be prosecuted. And so the causes of action in the two forums are not thereby made dissimilar." Compare with this, however, *Kiefer v. Grand Trunk Ry. Co.*, 12 App. Div. 28, 42 N. Y. Supp. 171; affirmed in 153 N. Y. 688, 48 N. E. 1105.

It seems, also, to be tacitly assumed in *Roe v. Jerome*, 18 Conn. 138, 159, that in an action of trover the rule of damages should be determined by the law of the forum, rather than by the law of the place of conversion. The case reaches, however, a diametrically opposite result as to the rule, in actions for breach of contract at least, and the force of the dictum as authority is too small to be considerable. The cases which take the view that the rule or measure of damages pertains to the remedy, and, in an action of tort, is governed by the *lex fori* rather than the *lex loci delicti*, are opposed to the great weight of authority, and to what seems the better reason.

IV. Interest as Damages.

a. In General.—Distinction Between Conventional and Moratory Interest.—Interest, as an element of damages, is of two kinds. The first is such interest as the parties to a contract which is the subject matter of an action have agreed upon as a part of their contract. This is ordinarily known as conventional interest, and the principles which govern any conflict of laws as to this kind of interest are the same as those which control in the case of any other

provision of the contract. The other instance in which interest is an important element of damage is where, in fixing the amount of recovery for a breach of contract or tort, the law imposes an additional sum in the way of interest as damages for the detention of the money found to be due. This is known as moratory interest (Wharton on Conflict of Laws, sec. 513—*interest ex mora*) or interest by way of damages, and depends not upon any contractual obligation to pay interest, but upon the theory that the party breaching the contract or committing the tort became bound at the time of the breach to make reparation, and for this delay in making such reparation, the injured party is entitled to such interest as will recompense him therefor. Briefly put, moratory interest is allowed, not as an element of the damage which accrued at the time and because of the breach, but as a damage resulting from the failure of the party at fault to make prompt reparation.

Conventional interest, while it forms an element in computing the amount of recovery, does so in the same way that a provision of the contract limiting liability, or any other contractual provision as to the amount involved in the contract, does. In the sense in which that phrase is here used, conventional interest does not affect the "measure of damages," and will not, therefore, be here considered. The principles which govern in determining a conflict of laws as to moratory interest, or interest which, strictly speaking, is allowed by way of damages, will, however, be considered.

b. Conflict as Between Law of Place of Making and of Place of Performance of Contract.

1. General Rule.—Leaving out of consideration for the time the effect of the *lex fori*, as such, in determining the rate of interest which is to be allowed by way of damages, as between the law of the place where the contract is made (*lex loci contractus*), and that of the place where it is to be performed (*lex loci solutionis*), the latter is quite uniformly held to control. It is there that the contract was to be performed, or the money paid; it is there that the breach occurred, the liability of the parties attached, and the amount recoverable became due. It is, therefore, by the law of that place that the damages for the detention of this sum should be measured. The value of money at that place forms the true standard of recompense for the delay, and that value is the rate of interest which custom, or, as is more frequently the case, statutory enactment has established.

Most of the cases in which this rule is laid down are cases in which the forum is the same, either as the place of contract, or the place of performance. Where the *lex loci solutionis* is held to control, although the place where the action is brought coincides with the place where the contract was executed, the case is, of course, a strong authority for the rule laid down. In many cases, however, the *lex fori* and *lex loci solutionis* coincide, and it is not always

easy or even possible to determine whether the decision that that law controlled as against the *lex loci contractus* was influenced by the fact that it was the law of the forum, or that it was the law of the place of performance. The following, however, appear to apply the law of the place of performance, as such, in preference to the *lex loci contractus*, where the two are different, to determine the proper rate of interest allowable by way of damages for the breach of contract or the detention of money generally: See *Clarke v. Taylor*, 69 Ark. 612, 65 S. W. 110; *Bent v. Laave*, 3 La. Ann. 88; *Ballister v. Hamilton*, 3 La. Ann. 401; *Jones v. Belcher*, Quincey (Mass.), 9; *Isaacs v. McAndrew*, 1 Mont. 437; *Sutro Tunnel Co. v. Segregated Belcher Min. Co.*, 19 Nev. 121, 7 Pac. 271; *Cartwright v. Green*, 47 Barb. 9; *Fanning v. Consequa*, 17 Johns. 511, 8 Am. Dec. 442 (reversing 3 Johns. Ch. 587); *Stewart v. Ellice*, 2 Paige, 604; *Irvine v. Barrett*, 2 Grant Cas. (Pa.) 73; *Stepp v. National Life etc. Assn.*, 37 S. C. 417, 16 S. E. 134. Compare, also, *Pomeroy v. Ainsworth*, 22 Barb. 118; *Thornton v. Dean*, 19 S. C. 583, 45 Am. Rep. 796.

2. **Promissory Notes.**—The rule above laid down as applicable to contracts generally is of frequent application in cases where the cause of action arises out of the nonpayment of negotiable instruments. Where a promissory note is not paid at maturity, the breach occurs at the place where the note was payable, and interest by way of damages for the detention of the debt is allowed from that time, and at the rate prescribed by the law of that place: *Peacock v. Banks, Minor* (Ala.), 387; *Hunt v. Hall*, 37 Ala. 702; *Vinson v. Platt*, 21 Ga. 135; *Chumaseiro v. Gilbert*, 26 Ill. 39; *Lapice v. Smith*, 13 La. 91, 33 Am. Dec. 555 (compare *Hawley v. Sloo*, 12 La. Ann. 815); *Howard v. Brauner*, 23 La. Ann. 369; *Healey v. Gorman*, 15 N. J. L. 328; *Happins v. Miller*, 17 N. J. L. 185; *Thompson v. Ketcham*, 4 Johns. 285; *Wood v. Kelso*, 27 Pa. St. 241.

3. **Bills of Exchange.**—The principle is equally applicable to bills of exchange, and, in an action against the acceptor, on such an instrument, interest is allowed as damages after maturity, at the rate obtaining in the jurisdiction, where the bill is payable: *Dickinson v. Branch Bank at Mobile*, 12 Ala. 54; *Faden v. Sharp*, 4 Johns. 183; *Freerson v. Galbraith*, 80 Tenn. (12 Lea) 129; *Bank of Illinois v. Brady*, 3 McLean, 268, Fed. Cas. No. 888; *Cooper v. Waldegrove*, 2 Beav. 282. The same is true of a "virtual acceptance" or contract to accept: *Boyce v. Edwards*, 4 Pet. 111.

With respect to the drawers and indorsers of a bill of exchange, the cases, while agreed that the place of performance of the contract of those parties furnishes the law by which interest *ex mora* is to be computed, are divided as to whether this place is that where the bill is drawn or endorsed, or where it is payable. The view that the law of the place of drawing or indorsement controls is supported by the weight of authority and by what appears to be

the better reason. "The drawer of the bill does not contract to pay the money in the foreign place on which the bill is drawn; neither does the indorser. They respectively contract only to guarantee its acceptance and payment at that place by the drawer; and, in default of such payment by the latter, they agree, upon due protest and notice, to reimburse the holder of the bill in principal and damages, at the place where they severally entered into the contract. The acceptor, on his part, it is true, contracts to pay the bill at the place of acceptance, or the place fixed for the payment thereof; but the contract of the latter is separate and distinct from the contract of the drawer or indorser. The drawer and indorser, in legal contemplation, contract in the place where the bill is drawn or indorsed, a conditional obligation, that if the bill is dishonored and due notice thereof given them, they will respectively pay the amount of the bill at the place of their contract. The contract of each of the parties—the drawer, indorser and acceptor—is, in effect, a several contract made in the place where the bill is drawn, indorsed or accepted; and the rights, as well as the liabilities, of each party are to be regulated and governed by the law of the place of his contract": *Green v. Bond*, 37 Tenn. (5 Sneed) 328. To the same effect are *Price v. Page*, 24 Mo. 65; *Page v. Page*, 24 Mo. 595; *Bouldin v. Page*, 24 Mo. 594; *Winthrop v. Pepon*, 1 Bay (S. C.), 468; *Bailey v. Heald*, 17 Tex. 102 (overruling *Able v. McMurray*, 10 Tex. 350); *Ex parte Heidelback*, 2 Low. Dec. 526, Fed. Cas. No. 6322; *Gibbs v. Fremont*, 20 Eng. L. & Eq. 555, 9 Ex. 25, 22 L. J. Ex. 302, 17 Jur. 820, 1 Week. Rep. 482. See, however, for cases taking the view that the place at which the bill is payable furnishes the basis of computing moratory interest against the drawer or indorser: *Mullen v. Morris*, 2 Pa. St. 85; *Cooper v. Sandford*, 12 Tenn. (4 Yerg.) 452, 26 Am. Dec. 239. See, *supra*, II, a, 2, A, as to what law determines the damages (other than interest) imposed upon the drawer or indorser of a protested bill of exchange.

c. *Effect of Lex Loci Rei Sitae*.—The influence of the *lex loci rei sitae* or law of the place where the property is situated has already been discussed with reference to the conflict of laws as to the measure of damages generally: See p. 717. So far as the computation of interest by way of damages is concerned, it is determined by the law of the place where a debt is payable, irrespective of the location of the property which is mortgaged as security for its payment: *Lefler v. Dermott*, 18 Ind. 246; *Kavanaugh v. Day*, 10 R. I. 393, 14 Am. Rep. 691; *Cocke v. Hatcher* (Tenn.), 4 S. W. 170. See, also, *Little v. Riley*, 43 N. H. 109; *Taylor v. Simpkins*, 38 Misc. Rep. 246, 77 N. Y. Supp. 591. In *Quince v. Callender*, 1 Desaus. (S. C.) 160, it is held that where a marriage bond was made in North Carolina, but the lands on which the settlement was made lay in South Carolina, the interest allowable was at the legal rate in the latter state.

d. Effect of Lex Fori.

1. **In General.**—The sharpest conflict, however, as to the law regulating the amount of interest allowable as damages, is with respect to the effect of the *lex fori*. According to one line of cases, representing the undoubted weight of authority, the law of the place where the liability accrued is the law which determines whether and at what rate interest by way or damages is recoverable, the *lex fori* not being regarded as in any way affecting this question. In some jurisdictions, on the other hand, moratory interest is held dependent upon the law of the forum, regardless of the law of the place where the liability accrued.

2. Foreign Judgments.

A. Weight of Authority—Law of Place Where Judgment is Rendered Controls.—A connection in which this question is very frequently presented, and with reference to which the conflict of authority is quite decided, arises where action is brought in one state or country on a judgment recovered in the courts of another. By the weight of authority, the questions whether interest is recoverable at all on the amount of the judgment, and, if so, at what rate, is to be determined by the law of the place where the judgment is rendered. The theory upon which these cases proceed is that interest, when allowed as damages, is allowed as a recompense for the delay of the judgment debtor in satisfying his obligation. The damage occasioned by this delay is dependent upon the value of money at the place where performance was due—i. e., at the place where judgment was rendered—and it is, therefore, by the law of that place that the interest allowable is determined: *Crawford v. Simonton*, 7 Port. 110; *Murray v. Cone*, 8 Port. 250; *Hudson v. Daily*, 13 Ala. 722; *Clark v. Pratt*, 20 Ala. 470; *Harrison v. Harrison*, 20 Ala. 629, 56 Am. Dec. 227; *Thompson v. Monrow*, 2 Cal. 99, 56 Am. Dec. 318; *Cavender v. Guild*, 4 Cal. 250; *Stewart v. Spaulding*, 72 Cal. 264, 13 Pac. 661; *Brown v. Todd*, 16 Ky. Law Rep. 697, 29 S. W. 621; *Gordon v. Phelps*, 30 Ky. (7 J. J. Marsh.) 619; *Wetherill v. Stillman*, 65 Pa. St. 105; *Schell v. Stetson*, 12 Phila. 187; *Ingram v. Drinkaw*, 14 Tex. 351; *Bushby v. Camac*, 4 Wash. C. C. 296, Fed. Cas. No. 2226; *Evans v. White*, Hemp. 296, Fed. Cas. No. 4572a; *Knapp v. Knapp*, 59 Fed. 641. In *Clarke v. Day*, 2 Leigh (Va.), 172, a writ of inquiry to ascertain the interest due on a Kentucky judgment was awarded. This proceeding would, of course, have been unnecessary had the law of the forum been held to control. In a number of cases, also, the *lex fori* was applied, but because the law of the place where the judgment was rendered was not proved, these cases recognizing that where such law is proved, it controls as to the interest recoverable on a foreign judgment: *Crafts v. Clark*, 38 Iowa, 237; *David v. Porter*, 51 Iowa, 254, 1 N. W. 529; *Reynolds v. Powers*, 96 Ky. 481, 29 S. W. 299 (under Kentucky statute by which foreign judgments presumed to draw interest at Kentucky

rate: Ky. Stats. c. 60, sec. 7); *Crone v. Dawson*, 19 Mo. App. 214; *Nelson v. Felder*, 7 Rich. Eq. (S. C.) 395. So, in some cases, it is held that interest is recoverable on a foreign judgment, although it is not shown that judgments bear interest by the law of the state where it was rendered. Where such foreign law is proved, however, it would, without doubt, be held to control: *Prince v. Lamb*, 1 Ill. (Breese) 378; *Warren v. McCarthy*, 25 Ill. 95. See, also, *Bruckman v. Taussig*, 7 Colo. 561, 5 Pac. 152.

B. Contrary Doctrine.—Opposed to the view taken by these cases is a line of authorities which regard the allowance of interest on a foreign judgment as a matter of remedy merely, and, therefore, controlled entirely by the law of the forum. According to the courts adopting this view, "in suits upon judgments, interest is recoverable, not as a sum due by contract of the parties, but as damages, and follows the rule in force in the jurisdiction where the suit is brought." It is true, of course, that interest on a judgment is not determined by the contract of the parties, but it is not apparent why, from the mere fact that it is allowed as damages ("from considerations of justice, as damages for the detention of money due": *Olson v. Veazie*, 9 Wash. 481, 43 Am. St. Rep. 855, 37 Pac. 677), it necessarily follows that the rate is to be determined by the *lex fori*. If these damages are to be compensatory, the interest given as compensation should it seems, be determined by the rate of the place where the liability accrued and the money was detained. The view that the *lex fori* controls the rate of interest allowable is, however, followed by a number of courts, and where followed is quite strongly asserted as the preferable doctrine: *Barringer v. King*, 5 Gray, 9; *Hopkins v. Shepard*, 129 Mass. 600; *Clark v. Child*, 136 Mass. 344; *Shickle v. Watts*, 94 Mo. 410, 7 S. W. 274; *Mahurin v. Bickford*, 6 N. H. 567; *Wells, Fargo & Co. v. Davis*, 105 N. Y. 670, 12 N. E. 42 (compare *Taylor v. Simpkins*, 77 N. Y. Supp. 591, 38 Misc. Rep. 246); *Cocke v. Hatcher* (Tenn.), 4 S. W. 170; *Ritchie v. Carpenter*, 2 Wash. 512, 26 Am. St. Rep. 877, 28 Pac. 380; *Olson v. Veazie*, 9 Wash. 481, 43 Am. St. Rep. 855, 37 Pac. 677. See, also, *Adams v. Way*, 33 Conn. 419.

C. Whether Interest is Allowable on.—In *Atkinson v. Braybrook*, 4 Camp, 380, 1 Stark. 219, Lord Ellenborough held that the plaintiff in an action of debt on a judgment recovered in Jamaica was not entitled to interest, apparently laying it down as a general proposition that interest was not recoverable on a foreign judgment. The case has never been followed as law in this country: See *Mahurin v. Bickford*, 6 N. H. 567, 571; and is not the law in England. In *McClure v. Dunkin*, 1 East, 436, an allowance of interest on a judgment recovered in Ireland was upheld, but it does not clearly appear from the report whether it was computed at the English or the Irish rate, and in *Baun v. Dalzell*, 3 Car. & P. 376, 14 Eng. Com. L. 618, Lord Tenterden instructed the jury that in an action of debt

on an Irish judgment, in case they found for the plaintiff, to allow such interest as they may think reasonable.

D. Where Judgment Specifies Rate of Interest.—The fact that the foreign judgment itself provides for interest at a certain rate until paid does not seem to have much effect in determining whether interest is allowable. In those states where interest as damages on a foreign judgment is allowed at the rate obtaining at the place where the judgment is rendered, if the judgment itself provides for a certain rate, it will be allowed: *Hudson v. Daily*, 13 Ala. 722; *Stewart v. Spaulding*, 72 Cal. 264, 13 Pac. 661; *David v. Porter*, 51 Iowa, 254, 1 N. W. 528. Compare, also, *Bruckman v. Taussig*, 7 Colo. 561, 5 Pac. 152. In those jurisdictions, on the other hand, in which the *lex fori* is held to govern, it is regarded as immaterial that another rate is specified in the judgment. Thus, in *Clark v. Child*, 136 Mass. 344, where a California judgment was made the basis of an action in the courts of Massachusetts, it is said by Morton, C. J.: "If, by the general laws of California, it was provided that upon all judgments of its courts interest should run at the rate of seven per cent, this provision would not operate in another state in a suit upon a judgment. The fact that the provision is embodied in the record of the judgment cannot give it greater force. It is not an essential part of the judgment which other states are bound to respect and enforce, but affects the remedy upon it, which is governed by the *lex fori*. One state cannot thus control the remedy and determine the rule of damages which shall govern sister states in which a remedy is sought upon such judgment." To the same effect are *Wells, Fargo & Co. v. Davis*, 105 N. Y. 670, 12 N. E. 42; *Arnott v. Redfern*, 2 Car. & P. 88, 12 Eng. Com. L. 466.

E. Effect of Federal Constitution.—In *Schell v. Stetson*, 12 Phila. 187, it was held that if a judgment bears interest in the state in which it is rendered, it must be held to bear the same interest when brought before the courts of another state, on the ground, it seems, that this is required by the provision of the federal constitution that each state shall give full faith and credit to the public acts, records and judicial proceedings of every other state. In *Nelson v. Reider*, 7 Rich. Eq. 395, on the other hand, this constitutional provision is said to relate merely to the mode of authentication and proof. The latter seems the preferable view.

3. Domestic Judgment on Foreign Cause of Action.—Where a judgment was rendered in the same state as that in which action is later brought upon it, the rate of interest fixed by the law of the forum is properly allowable, regardless of the law which controlled the cause of action on which the judgment was rendered. The cause of action previously existing became merged in the judgment, and in a subsequent action on the latter what interest is recovered as damages is recovered for delay in payment of the judgment: *Gordon v.*

Phelps, 30 Ky. (7 J. J. Marsh.) 619; Wilson v. Marsh, 13 N. J. Eq. 289; Neil v. First Nat. Bank, 50 Ohio St. 193, 33 N. E. 720; Cocke v. Hatcher, 4 S. W. (Tenn.) 170; Scotland County v. Hill, 132 U. S. 107, 10 Sup. Ct. Rep. 26; Evans v. White, Hemp. 296, Fed. Cas. No. 4572a; Bodily v. Bellamy, 2 Burr. 1094, 1 W. Black. 267.

4. Contracts in General.

A. Weight of Authority—Lex Fori Does not Control.—The conflict as to the effect of the lex fori in fixing the amount of interest recoverable as damages is by no means confined to cases where foreign judgments are involved. It exists with reference to contracts generally, and the cases are divided as to whether, in an action on a contract or for the recovery of money unlawfully detained, the law of the place where the liability accrued or the law of the forum fixes the amount of interest *ex mora*. Here, as in the cases already considered, the weight of authority is in favor of the view that the law of the place where the cause of action arises furnishes the proper basis of computation, and that the law of the forum is inapplicable: Insurance Co. of North America v. Forcheimer, 86 Ala. 541, 5 South. 870; Clarke v. Taylor, 69 Ark. 612, 65 S. W. 110; Morris v. Wibaux, 159 Ill. 627, 43 N. E. 837; affirming 47 Ill. App. 630; Cocke v. Conigmacher, 8 Ky. (1 A. K. Marsh.) 254; Lesesne v. Cook, 16 La. 58; Granger's Life Ins. Co. v. Brown, 57 Miss. 303, 34 Am. Dec. 446; Smith v. Smith, 2 Johns. 235, 3 Am. Dec. 410; Cartwright v. Green, 47 Barb. 9; Archer v. Dunn, 2 Watts & S. 327; Stepp v. National Life etc. Assn., 37 S. C. 417, 16 S. E. 134; Burton v. Anderson, 1 Tex. 93; Randall v. Meredith (Tex.), 11 S. W. 170; Porter v. Munger, 22 Vt. 191; Lanusse v. Barker, 3 Wheat. 101; Jaffray v. Dennis, 2 Wash. C. C. 253, Fed. Cas. No. 7171; Anonymous, 1 Eq. Abr. 238; Bodily v. Bellamy, 2 Burr. 1094, 1 W. Black. 267. In the cases above cited the law applied was in no instance the law of the forum, but in a number of cases that law is applied merely in the absence of proof of the law of the place where the liability accrued. Had this been proved it would have controlled, and the cases are authority for the proposition that where proved, the law of the place where a cause of action arises will determine the rate of interest allowed by way of damages, rather than the law of the forum: See, for instance, Thomas v. Beckeman, 40 Ky. (1 B. Mon.) 29; Cooper v. Reany, 4 Minn. 528; Hall v. Woodson, 13 Mo. 462; Mason v. Mason, 12 La. 539; Moseley v. Burrow, 52 Tex. 396.

B. Contrary Doctrine.—The cases opposing this view and upholding the doctrine that in an action for the breach of a contract or the detention of money in general, moratory interest is to be allowed in accordance with the lex fori are few in number, and opposed to the great weight of authority: See, however, Beckwith v. Talbot, 2 Colo. 639; Temple v. Belding, 1 Root (Conn.), 314; Von

Hemert v. Porter, 11 Met. 210; Eaton v. Mellus, 7 Gray, 566 (compare Winthrop v. Carleton, 12 Mass. 4); Gooddard v. Foster, 17 Wall. 123; Law v. East India Co., 4 Ves. 825. See, also Sherman v. Gassett, 9 Ill. 521.

5. Negotiable Instruments.

A. Promissory Notes.

(1) **Weight of Authority.**—The considerations which apply to contracts generally are equally applicable when the subject matter of the action is a negotiable instrument. Here, again, the great weight of authority supports the view that the law of the place where the liability accrued—that is, where the instrument was made or was made payable—rather than the law of the forum, controls in determining whether and at what rate interest as damages is recoverable. For cases in which this is the holding with reference to actions on promissory notes, see Peacock v. Banks, Minor (Ala.), 387; Hunt v. Hall, 37 Ala. 702; Vinson v. Platt, 21 Ga. 135; Chumaseo v. Gilbert, 26 Ill. 39; Brockenridge v. Baxton, 5 Ind. 501; Lefler v. Dermott, 18 Ind. 246; Lapice v. Smith, 13 La. 91, 33 Am. Dec. 555; Kermott v. Ayer, 11 Mich. 181; Wood v. Kelso, 27 Pa. St. 241; Kavanaugh v. Day, 10 R. I. 393, 14 Am. Rep. 691; Peck v. Mayo, 14 Vt. 33, 39 Am. Dec. 205; Courtois v. Carpenter, 1 Wash. C. C. 376, Fed. Cas. No. 3286. This view is also taken in a number of cases in which the law of the forum was applied, but because of the absence of proof of the foreign law. Had this been proved it would have been adopted: See, for instance, Ripka v. Pope, 5 La. Ann. 61, 52 Am. Dec. 579; Desnoyer v. McDonald, 4 Minn. 515; Leavenworth v. Brockway, 2 Hill, 201. See, also, Whitlock v. Castro, 22 Tex. 108. In Healy v. Gorman, 15 N. J. L. 328, the law of New Jersey was held to control in the allowance of interest on a note made in New York payable in New Jersey. New Jersey was here both the place of performance and of the forum; but the subsequent case of Hoppins v. Miller, 17 N. J. L. 185, makes it clear that where the *lex fori* is opposed to the law of the place where the liability accrues, the latter law will control.

(2) **Contrary Doctrine.**—In Ayer v. Tilden, 15 Gray, 178, 77 Am. Dec. 355, on the other hand, it is held that interest allowed by way of damages on a promissory note is determined by the *lex fori*. "The interest is not a sum due by the contract, for by the contract no interest was payable, and is not, therefore, affected by the law of the place of contract. It is given as damages for the breach of the contract, and must follow the rule in force within the jurisdiction where the judgment is recovered": See, also, Burrows v. Stryker, 47 Iowa, 477; Preston v. Walker, 26 Iowa, 205, 96 Am. Dec. 140.

(3) **Where Payable, Generally.**—In Kopelke v. Kopelke, 112 Ind. 435, 13 N. E. 695, it is held that where a note is made in a state other than that of the forum and no place of payment is specified,

it is payable everywhere, and the *lex fori*, and not the *lex loci contractus* governs the amount of interest allowable as damages. Ordinarily, however, it is held that the place of payment where none is specified is, in the case of a note, the residence of the maker, and, in the case of a bill of exchange, that of the drawee: See Daniel on Negotiable Instruments, 5th ed., secs. 90, 1451; Hawley v. Sloo, 12 La. Ann. 815; Hoppins v. Miller, 17 N. J. L. 185; Smith v. Smith, 2 Johns. 235, 3 Am. Dec. 410; Clark v. Searight, 135 Pa. St. 173, 19 Atl. 941, 20 Am. St. Rep. 868.

B. Corporate and Municipal Bonds, etc.—So in the case of corporate or municipal bonds, interest coupons, etc., the law of the place where they are made payable is ordinarily held to fix the rate of interest allowed as damages after their maturity, the law of the forum as to this being regarded as immaterial: See Gray v. State, 72 Ind. 567; Arrington v. Gee, 27 N. C. 590; Appeal of Columbus etc. R. Co., 109 Fed. 177, 48 C. C. A. 275; Coghlan v. South Carolina R. Co., 142 U. S. 101, 12 Sup. Ct. Rep. 150; Scotland County v. Hill, 132 U. S. 107, 10 Sup. Ct. Rep. 26; Town of Pana v. Bowler, 107 U. S. 529, 2 Sup. Ct. Rep. 704. In Huey v. Macon County, 35 Fed. 481, the law of the forum was applied, but only because the law of the place where the instruments there sued on were payable was not proved. In Baltzer v. Kansas Pac. Ry. Co., 3 Mo. App. 574, which was an action on certain interest coupons detached from bonds, it is said that interest is to be computed according to the law of the state where the liability accrued, "unless the rate be less there than in the state in which judgment is rendered." The case is not reported in full; no reason is given for the qualification quoted, nor is any apparent.

C. Bills of Exchange.—The principles above applied to other forms of negotiable instruments are equally pertinent to bills of exchange. The weight of authority, if not the uniform holding, where these are involved, likewise supports the doctrine that the place of the accrual of the liability, and not the place of the forum, furnishes the law by which the amount of interest allowed as damages is to be determined: Dickinson v. Branch Bank at Mobile, 12 Ala. 54; Price v. Page, 24 Mo. 65; Page v. Page, 24 Mo. 595; Bouldin v. Page, 24 Mo. 594; Foden v. Sharp, 4 Johns. 183; Mullen v. Morris, 2 Pa. St. 85; Clark v. Searight, 135 Pa. St. 173, 20 Am. St. Rep. 868, 19 Atl. 941; Winthrop v. Pepon, 1 Bay, 468; Cooper v. Sandford, 12 Tenn. (4 Yerg.) 452, 26 Am. Dec. 239; Green v. Bond, 37 Tenn. (5 Sneed) 328; Able v. McMurray, 10 Tex. 350; Bank of Illinois v. Brady, 3 McLean, 268, Fed. Cas. No. 888; Ex parte Heidelberg, 2 Low. Dec. 526, Fed. Cas. No. 6322; Gibbs v. Fremont, 20 Eng. L. & Eq. 555, 9 Ex. 25, 17 Jur. 820, 1 Week. Rep. 482, 22 L. J. Ex. 302; Allen v. Kemble, 6 Moore P. C. 314.

6. Torts.—Whether and to what extent interest is allowable by way of damages for a tort is to be determined, it has been held, by

the law of the place where the injury occurred and the damage accrued: *Ekins v. East India Co.*, 1 P. Wms. 395. See, also, *Bischoffsheim v. Baltzer*, 21 Fed. 531. In Missouri, on the other hand, it is held that in an action for conversion of goods, where the conversion took place in a foreign state and the action is brought in Missouri, the rate is determined by the law of the latter state: *Carson v. Smith*, 133 Mo. 606, 34 S. W. 855. Compare, also, *New York etc. R. R. Co. v. Estill*, 147 U. S. 591, 13 Sup. Ct. Rep. 444.

7. *Review of Cases as to.*—The result of the authorities above considered shows that by the weight of authority the law of the place where the liability has accrued, rather than that of the forum, determines whether interest is allowable as an element of damage, and, if so, at what rate it is to be computed. Of the states which take an opposing view, in but few are the cases entirely consistent, and the weight of reason is certainly with the doctrine that the place where the cause of action arises furnishes the law applicable. The question at what rate interest is computable is perhaps confused by regarding it as a question of conflict of laws at all. Once it is determined that interest is to be allowed, it is allowable only on the theory of compensating the injured party, and the question is not, strictly speaking, what law governs, but is rather what rate of interest will be compensatory. This is obviously the rate of interest at the place where payment should have been made. If fixed by custom or usage only, evidence of the custom or usage is admissible: *Crawford v. Simonton*, 7 Port. (Ala.) 110. Whether determined by custom or by statute, however, the rate of interest at the place of accrual of liability is the proper criterion for estimating the amount of damage done by failure to pay. The matter is not in any true sense one of remedy merely, and the *lex fori* is, it would seem, entirely inapplicable.

c. Presumption, etc.

1. *Foreign Law not a Subject of Judicial Notice.*—In *Schell v. Stetson*, 12 Phila. 187, it is held that the courts of one state will take judicial notice of the interest rate allowed by the laws of another state, where an action is brought in the one state upon a judgment rendered in the other. The case is, however, opposed to the otherwise uniform holding of the authorities. The interest rate of one state is in another state a fact which must be proved, and will not be judicially noticed.

2. Consequences of Failure to Prove Foreign Law.

A. *View that No Interest is Allowable.*—Accordingly, it is held in a number of states that a foreign interest rate must be found by a jury, and no interest can be allowed, in a case where interest is properly governed by the foreign law, unless that interest rate be proved as a fact: See for cases where this is held in an action on a foreign judgment, *Crawford v. Simonton*, 7 Port. 110; *Murray*

v. Cone, 8 Port. 250; Clarke v. Pratt, 20 Ala. 470; Harrison v. Harrison, 20 Ala. 629, 56 Am. Dec. 227; Cavender v. Guild, 4 Cal. 250; Ingram v. Drinkard, 14 Tex. 259. Where the foreign judgment itself specifies the rate of interest it shall draw, that rate will be allowed: See *supra*, IV, d, 2, D. See, also, post, IV, f, for statutory provisions in this connection. So where the subject matter of an action is a promissory note or bill of exchange, it is held in these states that the interest rate, if determined by the law of another state, is a question for the jury: See *Garner v. Tiffany*, Minor (Ala.), 167; *Peacock v. Banks*, Minor (Ala.), 387; *Evans v. Clark*, 1 Port. (Ala.) 388; *Evans v. Irvin*, 1 Port. 390; *Hanrick v. Andrews*, 9 Port. 9; *Dunn v. Clement*, 2 Ala. 392; *Dickinson v. Branch Bank at Mobile*, 12 Ala. 51; *Insurance Co. of North America v. Forchheimer*, 86 Ala. 541, 5 South. 876; *Morgan v. Froth*, 24 Ky. (1 J. J. Marsh.) 94; *Ingraham v. Arnold*, 24 Ky. (1 J. J. Marsh.) 406; *Johnson v. Williams*, 24 Ky. (1 J. J. Marsh.) 489; *Pawling v. Sartain*, 27 Ky. (4 J. J. Marsh.) 238; *Swett v. Dodge*, 12 Miss. (4 Smedes & M.) 667; *Cooke v. Crawford*, 1 Tex. 9, 46 Am. Dec. 93; *Ramsey v. McCanley*, 2 Tex. 189; *Cook v. Crawford*, 4 Tex. 420; *Hill v. George*, 5 Tex. 87; *Wheeler v. Pope*, 5 Tex. 262; *Able v. McMurray*, 10 Tex. 350. See, also, *Kermott v. Ayer*, 11 Mich. 181.

In a number of cases the courts taking this view have nevertheless applied the law of the forum on the ground that the place of making or of performance was not shown to have been outside the jurisdiction of the forum. Thus, in *Smith v. Robinson*, 11 Ala. 270, it was held that an allegation that a note was payable at "Macon" did not show that it was not payable in Alabama. So in *Richardson v. Williams*, 2 Port. 239, a statement that a bond was executed in Virginia was held not equivalent to an allegation that it was executed in the state of Virginia, and in *Whitlock v. Castro*, 22 Tex. 108, it was held that the court could not judicially know New York and New Orleans to be outside of Texas. In *Pawling v. Sartain*, 27 Ky. (4 J. J. Marsh.) 238, on the other hand, the court took judicial notice of the fact that New York was not in Kentucky, and in *Dunn v. Clement*, 2 Ala. 392, the court took judicial notice of the somewhat obvious fact that Kemper county, Mississippi, was not within the state of Alabama.

B. View that Common Law Prevails.—In some few jurisdictions it is held that in the absence of express proof of the rate of interest allowed in another state, the common law will be presumed to exist there. Accordingly, where an action is prosecuted in one state on a judgment rendered in another, in the absence of proof as to the law in the latter jurisdiction, it is held that no interest will be allowed on the ground that at common law a judgment does not bear interest: *Thompson v. Monrow*, 2 Cal. 99, 56 Am. Dec. 318; *Cavender v. Guild*, 4 Cal. 250. This presumption does not, it has been held, hold where the state where the judgment was rendered

was not "one of those states which, prior to becoming members of the Union, were subject to the laws of England": *Crane v. Dawson*, 19 Mo. App. 214. As to whether a judgment bears interest at common law, see *Freeman on Judgments*, sec. 441.

C. View that Domestic Law Governs.—Still a third view is that in the absence of any proof as to the law of a foreign state with respect to interest, the law of the forum will be applied, some of the cases which adopt this view placing it upon the ground of a presumption, in the absence of proof to the contrary, that the foreign law is in this respect the same as that of the forum. Whatever the basis of the doctrine, it is one which is adopted in a number of jurisdictions: *Chumaseo v. Gilbert*, 24 Ill. 293; *Chumaseo v. Gilbert*, 24 Ill. 651; *Chumaseo v. Gilbert*, 26 Ill. 39; *Hall v. Kimball*, 58 Ill. 58; *Browning v. Merrit*, 61 Ind. 425; *Crafts v. Clark*, 38 Iowa, 237; *David v. Porter*, 51 Iowa, 254, 1 N. W. 528; *Mason v. Mason*, 12 La. 589; *Patterson v. Garrison*, 16 La. 557; *Ripka v. Pope*, 5 La. Ann. 61, 52 Am. Dec. 579; *Hawley v. Sloo*, 12 La. Ann. 815; *Kuenzi v. Elvers*, 14 La. Ann. 391, 74 Am. Dec. 434; *Wood v. Corl*, 4 Met. 203; *Desnoyer v. McDonald*, 4 Minn. 515; *Cooper v. Beane*, 4 Minn. 528; *Hall v. Woodson*, 13 Mo. 462; *Crone v. Dawson*, 19 Mo. App. 214; *Fitzgerald v. Fitzgerald ete. Co.*, 41 Neb. 374, 59 N. W. 538; *Longee v. Washburn*, 16 N. H. 134; *Leavenworth v. Brockway*, 2 Hill, 201; *Pauska v. Daus*, 31 Tex. 67; *Moseby v. Burrow*, 52 Tex. 396; *Huey v. Macon Co.*, 35 Fed. 481. See, also, *Tillotson v. Prichard*, 60 Vt. 94, 6 Am. St. Rep. 95, 14 Atl. 302.

f. Statutory Provisions.—In Kentucky, the former rule of that state that interest on an obligation accruing in another state could be allowed only on proof of the foreign rate, has been changed by statute making the law of Kentucky, in the absence of proof of the foreign law, applicable to determine the rate of interest allowable on foreign judgments: *Reynolds v. Powers*, 96 Ky. 481, 29 S. W. 299; and other obligations, liability on which accrued outside the state: *Thomas v. Beckman*, 40 Ky. (1 B. Mon.) 29.

In Alabama, under a statute providing that the Secretary of State shall compile and publish a table of the rates of interest in other states, and making such table *prima facie* evidence of the facts it purports to give, it is held that the rate of interest in a foreign state is nevertheless a question for the jury, and not a proper subject of judicial notice. The statute makes it merely *prima facie* evidence, which is, therefore, rebuttable, and it is held error to render judgment by default for interest at the rate of a foreign state as shown in the tables: *Clarke v. Pratt*, 20 Ala. 470; *Harrison v. Harrison*, 20 Ala. 629, 56 Am. Dec. 527; *Insurance Co. of North America v. Forcheimer*, 86 Ala. 541, 5 South. 876.

LOWERY v. CATE.

[108 Tenn. 54, 64 S. W. 1068.]

CONTRACTS OF INFANTS—Liability for Tortious Breach of Contract.—While an infant is liable for his independent tort, he is not liable for the tortious consequences of his breaches of contract, though the action may be in form as for a tort, so long as the subject of the suit is based on the contract. (p. 746.)

CONTRACTS OF INFANTS—Liability for Tort.—If an infant's tort is subsequent to, or independent of, his contract and not a mere breach thereof, but a distinct, willful, and positive wrong in itself, then, notwithstanding the contract, the infant is liable. (p. 746.)

CONTRACTS OF INFANTS—Liability for Negligent Breach of Contract.—If an infant contracts to thresh grain, and in performing the work negligently uses an engine without a spark-arrester, placed so near that it sets fire to and burns the grain and the shed containing it, he is not liable for the loss, without proof that his act was a willful and intentional wrong, done independently of, and outside of, the contract. (p. 748.)

N. Q. Allen, Traynor & Smith, B. B. C. Witt, J. C. Ramsey and J. S. Shamblin, for the plaintiff.

Burkett & Mansfield, Mayfield, Son & Aiken, R. M. Cope-land, and J. L. Smith, for the defendant.

⁵⁵ **McALISTER, J.** The plaintiff below recovered a verdict and judgment for the sum of three hundred and ten dollars against the defendant Lowry, for the value of wheat and other property alleged to have been destroyed through his negligence.

It appears from the proof that the defendant Lowery was the owner of an engine and thresher, and entered into a contract with plaintiffs to thresh their wheat for every twentieth bushel. The contract was made by J. G. Cate, for himself and other parties in interest, with the defendant Lowery. The wheat was stored in a large shed on Cate's farm, the portion of each of the parties being packed in separate tiers. The defendant Lowery, with his employes, arrived with the thresher early in the morning and began threshing the wheat. They continued threshing until about 1 o'clock in the afternoon, when the wheat caught fire from the sparks emitted from the engine, and both the wheat and oats stored in the shed, together with the shed, were totally destroyed.

⁵⁶ There is proof tending to show the value of the wheat was seven hundred and thirty dollars, the oats seventy-five dollars, and the shed one hundred and twenty-five dollars. Separate suits were brought by the parties in interest against the defend-

ant before a justice of the peace of Polk county. In the circuit court, by consent of parties, these causes were heard together, and verdict rendered in favor of the plaintiffs for sums aggregating three hundred and ten dollars.

There is proof tending to show that the defendant proceeded to thresh the wheat without any spark-arrester on his engine, and that on the day preceding, defendant had set fire to the wheat of one Howard, while threshing it. There is also proof tending to show that the engine and thresher were set in such position and at such an angle that the wind blew the sparks directly toward the shed. It is also shown that the wind was not blowing very hard in the morning, but during the day its velocity greatly increased, and plaintiff, seeing there was danger of the wheat catching fire, warned defendant's engineer, but the engineer said there was no danger; that he would turn on an exhaust valve and stop the sparks. Plaintiff admits he saw there was no spark-arrester on the engine, but says he thought that was all right. Plaintiff states that when he called his men to set the engine square, the work had commenced, and defendant said the angle set was all right. It was ⁵⁷ seventy-four feet from the point the fire caught to the engine. It would have been twenty feet farther if a square set had been made. Plaintiff states, on cross-examination, he did not stop them from making the angle set, nor did he stop them from running when he saw the danger, for the reason the engineer told him there was no danger, and that he could stop the sparks by turning on the exhaust valve.

There is no proof indicating any willfulness on the part of defendant or his employes in setting fire to the shed, but the case presented by plaintiff is one of negligence in the operation of the engine and thresher.

At the time the contract was made and the wheat destroyed Lowery was a minor eighteen years of age. Plaintiff Cates testified that he said to defendant, when he commenced the work, that he seemed rather young to be running a thresher. Defendant replied that he did not know much about it, but had men with him as employes who did understand it. On the trial below the defendant pleaded his infancy in bar of the action. Plaintiff's counsel demurred to the plea on the ground that the action was founded upon tort, and not upon contract, and an infant is liable in law for his torts. The court sustained the demurrer and the plea was stricken from the file. Counsel for defendant also submitted a supplemental request, asking ⁵⁸

the court to charge that if the loss resulted from a negligent performance of the contract, and there was no willful or intentional wrong, defendant would not be liable. This request was refused. The action of the court on the plea and refusal to charge, as requested, is made the basis of the third assignment of error, and raises the determinative question in the case.

We are of opinion the court was in error in sustaining the demurrer. The principle is well settled that an infant is liable in an action *ex delicto* for all injuries to persons or property committed by him: *Dial v. Wood*, 9 Baxt. 296; *Bessley v. State*, 2 Yerg. 481; *Weigand v. Malatesta*, 6 Cold. 367.

"But while an infant is liable for his torts, he is not liable for the tortious consequences of his breaches of contract, and though the action may be in form as for a tort, yet if the subject of it be based on contract, the suit will be attended with all the incidents of an action *ex contractu*: 16 Am. & Eng. Ency. of Law, 2d ed., 309. Again, the mere fact that the cause of action grows out of, or is connected with, contract, will not in every case shield the infant from liability. If the tort is subsequent to, or independent of, the contract, and not a mere breach of it, but is a distinct, willful and positive wrong in itself, then, notwithstanding the contract, the infant is liable. This principle is illustrated in the use of hired horses. If an infant hires ⁵⁹ a horse to be moderately driven or ridden, and the infant, from lack of experience, rides or drives the horse immoderately, or injures him by unskillful management, it is a mere breach of contract, and the plea of infancy is a complete defense to an action therefor. But if the infant willfully and intentionally injures the animal, or uses him for a different purpose for which he was hired, or drives him elsewhere or beyond the place contemplated in the contract, it is a conversion of the animal, which terminates the contract and renders the infant liable in trover for its value": 16 Am. & Eng. Ency. of Law, 2d ed., 309.

"The defense of infancy cannot be pleaded in actions for wrongs independent of contract, but it may be pleaded in all cases, where the cause of action is substantially founded on a contract, though the declaration might be framed in form of tort, instead of a contract. So that the plaintiff cannot indirectly make the defendant liable on a contract made during infancy by merely changing the form of the declaration": 1 Keener's Selections on Contracts, 513.

Mr. Cooley, in his work on Torts, page 103, says: "However, there is an exception to the rule. The distinction is this: If

the wrong grows out of contract relations, and the real injury consists in the nonperformance of a contract into which the party wronged has entered with an infant,⁶⁰ the law will not permit the adult to enforce the contract indirectly by counting on the infant's neglect to perform it, or omission of duty under it, as a tort. The reason is obvious. To permit this to be done would deprive the infant of that shield of protection which, in matters of contract, the law has wisely placed before him. If suit should be brought against an infant for the immoderate use of, and want of care of, a horse, which has been bailed to him, infancy is a good defense, the gravamen being a breach of contract of bailment. So infancy is a defense to an action by a ship owner against his supercargo for a breach of his instructions regarding the sale of the cargo, whereby the same was lost or destroyed."

Parsons on Contracts, on page 316, says: "An infant is protected against his contracts, but not against his frauds or other torts. If such tort or fraud consist in the breach of his contract, then he is not liable therefor in an action sounding in tort, because this would make him liable for his contract merely by a change in the form of action, which the law does not permit."

In the case of *Fitts v. Hall*, 9 N. H. 441, the court says that no liability growing out of a contract can be asserted against an infant.⁶¹ The test of an action against an infant is whether a liability can be made out without taking notice of the contract.

Now, applying the test laid down in the cases cited, it will be observed that the tort, which is the foundation of the present action, was committed in the performance of a contract, and is not a willful or intentional wrong, done independent of, and outside of, the contract.

The claim of plaintiff is that defendant was guilty of negligence in failing to have reasonably safe and suitable machinery, in that it had no spark-arrester, and that the defendant and his employes were negligent in the locating of the engine and thresher at an angle and in such proximity to the wheat shed. The gravamen of the action is that this negligence constituted a breach of the contract and furnished ground of liability.

Plaintiffs are bound in making out this case to show the contract, and the ground of liability is the negligent performance of that contract, whereby injury has resulted. There is no claim

of willful injury. Plaintiff must have known at the time this contract was made that defendant was an infant under twenty-one years, since he admits he told defendant he (defendant) seemed to be rather young to run a thresher. He cannot now complain that his contract was in law a voidable one, and that it imposed no liability ⁶² upon the defendant for its negligent performance.

For the error in sustaining the demurrer to the plea, and in refusing the supplemental request, the judgment is reversed and the cause remanded.

The Torts of Infants connected with contracts are considered in the monographic note to *Craig v. Van Bebber*, 18 Am. St. Rep. 720-724. The general rule is, that an infant is liable for his torts notwithstanding they may have arisen out of, or in some way may have been connected with, a contract: *Churchill v. White*, 58 Neb. 22, 76 Am. St. Rep. 64, 78 N. H. 369. But see *Slayton v. Barry*, 175 Mass. 513, 78 Am. St. Rep. 510, 56 N. E. 574.

COTTRELL v. GRIFFITHS.

[108 Tenn. 191, 65 S. W. 397.]

PARTITION—Married Women.—A partition deed or decree between tenants in common who are married women, including their husbands as decretal parties or joint grantees, carries no other or greater interest to the husbands than if the decree or deed had been made to their wives alone. Each wife thereafter holds her share in severalty, but no new title or additional estate is thereby conferred or created in favor of the husband. (p. 750.)

Green & Shields and De Armond & Ford, for the plaintiff.

Webb, McClung & Baker and J. C. Ford, for the defendant.

¹⁹² SNODGRASS, C. J. The question involved in this case is, What is the legal effect of a partition deed executed by two tenants in common to a third tenant, a married woman, where the deed includes the husband as joint grantee, though no agreement upon any consideration was made for such conveyance, or, in fact, made at all, but deed was executed under the following circumstances and upon the facts so showing, found by the court of chancery appeals? Jesse Wells, the father of Mrs. Ford, Mrs. Cottrell and Mrs. Griffiths, was the owner of the land in controversy. He died, and it descended to these married ladies, as tenants in common. Mrs.

Griffiths and Mrs. Ford conveyed to Mrs. Cottrell her share of the land, and, later, undertook to have the remainder of the land partitioned between them. A surveyor and notary were employed to partition and draw deeds, to be executed by the parties, each to the other, for the shares so surveyed and partitioned. This was done, but in drawing the deeds without direction from the parties, and not in accord with their intention, the notary named the husbands of the two married women as conveyees. The parties were all ¹⁹³ dissatisfied with this form of conveyance, the husbands setting up no claim of right or agreement upon any consideration, or without consideration, to have it done. The draughtsman was consulted, and he said the deeds conveyed no interests to the husbands as matter of law, but that he would insert a clause removing any supposed difficulty on this point, and thereon he interlined a clause showing that the deeds were in division of the lands of Jesse Wells, deceased (as already stated, the father of the married women attempting the partition). This was not altogether satisfactory, but they agreed to keep the deeds from record until they could take advice and look further into the matter. The husbands and wives concurred in this, and so the matter ended. The deeds were taken and kept by each without registration, or further action, until four days after the death of Mrs. Griffiths, which occurred on the 16th of February, 1901. The deeds were dated and put in possession of the parties on the 4th of October, 1892.

There were no children born to Mr. and Mrs. Griffiths, and hence no estate by curtesy, if the partition vested no title, either as tenant by the entirety or tenant in common with his wife, in him. It was denied by the sisters of Mrs. Griffiths that any estate did so vest, and they insisted on their right to present possession of the land as heirs of their deceased sister. This claim ¹⁹⁴ was not admitted, and thereupon, on the 14th of March, 1901, they filed the bill in this cause, in connection with their husbands, to assert their right, recover the land of Griffiths, and have his claim declared a cloud on their title thereto.

The answer denied their right and insisted that the deeds were delivered, or made without question, and all parties had held and claimed under them since their date to the filing of the bill.

The main contention in the proof was as to the delivery of the deeds. The court of chancery appeals found upon the

facts hereinbefore stated, and others not necessary to more fully recite, that there was no complete, unqualified delivery which made the deeds take effect in favor of the husbands, as it was neither so intended nor understood by them, and that they therefore took no interest. The court, therefore, did not pass upon the legal effect of the deeds, had they been, in fact, unqualifiedly delivered, and without other intent of operation than that which appeared on their face.

The assignment of errors raises the question that, upon the facts found, such delivery must be legally presumed, and defendant held to be the owner, as survivor of his wife, the joint grantee, or, at least, to a one-half interest as tenant in common.

This question need not be discussed at length. While we are satisfied with the conclusion of the ¹⁹⁵ court of chancery appeals, that what occurred did not bind the conveyee, Mrs. Griffiths, to a release of her interest, in whole or in part, to her husband, yet we hold that such would not have been the effect of the deed had it been to the satisfaction of the parties and unqualifiedly delivered.

We think the proposition of law is soundly settled in best reasoned cases that partition by decree or deed between tenants in common, when they are married women, and the decree or deed includes husbands with their wives as decretal parties or joint conveyees, carries no other or more interest to the husband than if such decree or partition deed had been made to the wife alone. Such decree or deed only adjusts the rights of the interested parties to the possession. It makes no new title or change in degree of title. Each does not take the allotment by purchase, but is as much seised of it by descent from the common ancestor as of the undivided share before partition. The deed of partition destroys the unity of possession, and henceforth each holds her share in severalty, but such deed confers no new title or additional estate in the land, or, we may add, less estate than that descended. The title being already in her, the deed merely designated her share by metes and bounds, and allotted it to be held in severalty: ¹⁹⁶ *Whitsett v. Wamack*, 159 Mo. 14, 81 Am. St. Rep. 339, 59 S. W. 961, and authorities cited.

This being the law, it makes no difference whether deed of partition was made to Mr. and Mrs. Griffiths, or to her alone, or made to both, or was in fact delivered, as the result would have been the same so far as the rights of both or either were

concerned. The husband could, under such deed, take no more interest than he could under one made to his wife alone.

It follows that, in any event, the decree of the court of chancery appeals, holding that complainants were entitled to the relief sought, is correct, and it is affirmed with costs.

A Deed in Partition passes no title, but simply designates the share of each cotenant. This principle is applied in *Harrison v. Ray*, 108 N. C. 215, 23 Am. St. Rep. 57, 12 S. E. 993, where one of the grantees is a married person, and the deed is made to him and his wife.

BILLINGTON v. JONES.

[108 Tenn. 234, 66 S. W. 1127.]

WILLS—Cancellation.—A written declaration signed by the testator that "this will is null and void," following his signature to an instrument, otherwise perfect as his will, together with his declaration that he had "defaced" and "killed" such will, is sufficient to cancel and revoke it, although the testator kept it in his possession in a locked drawer, and in such condition, until his death. (p. 754.)

Walker & McLane and Marshall & Armstrong, for the plaintiff.

Smithson, Armstrong & Neil, for the defendant.

235 WILKES, J. This is an issue of *devisavit vel non* over the will of Reuben Billington. The cause was heard before the trial judge in the court below, and the issue was found against the will, and the executor has appealed and assigned errors. There is no controversy but that the instrument was duly executed in proper form by Reuben Billington, but the contention is that it was revoked and rendered null and void by an indorsement upon it.

It was executed in 1881, and was left in the **236** care of James Wallace, one of the subscribing witnesses, where it remained some four or five years. Mr. Billington then went to the witness and called for the will, remarking that he wanted to make some changes in it. He took it home with him and kept it for some time in its original condition. His wife was not satisfied with it, because it did not, as she thought, make an equal distribution of his property among his children,

and importuned him to change or destroy it. After an attack of illness, he desired to go to California to see one of his children, and as a means of restoring his health. His wife made a condition of her going with him that he should destroy the will.

He thereupon, in answer to her importunities, took the will and wrote upon it below the signature, in pencil, the following words: "This will is null and void. R. Billington." After thus writing on it, he said to his wife: "Now, I have defaced it, and it is killed." The act of writing was witnessed by his wife and daughter, but they did not, at the time, know what was written. He placed the paper away in a lock drawer, and it was not seen again for more than twelve years, perhaps as many as fifteen, and not until after his death, when it was found in the drawer with other papers, some of which were valuable, and others not. The proof shows that he was a man of ²³⁷ sound mind and fully at himself up to his last sickness and death. He appears to have referred to his will only one time during these years, and that was in the presence of his son, the executor, to the effect that it seemed he would never have any peace about the will. The trial judge was of opinion, from the proof, that the testator, after executing his will, became dissatisfied with it, and wrote upon it with the purpose of revoking it, and that the writing and signature made under the circumstances showed an intention to cancel, and was sufficient to revoke and cancel the will. It is assigned as error that this writing and signature did not amount to a revocation. but that the will could only be revoked by destroying, or by executing some instrument of dignity equal to the will itself, and that this writing was not of that dignity. The fact that the testator kept the paper for a number of years among his valuable papers is urged as an indication that he intended it to continue to be his will, and to take effect as such, while, on the other hand, the fact that the indorsement made in pencil was allowed to remain on the will, and that it was never referred to in the course of fifteen years but once, and then in an indefinite manner, is cited to show that it was considered that the will was canceled, and no longer effective.

This extraneous testimony appears to be quite ²³⁸ equally balanced, and to throw but little, if any, light upon the real question, whether the will was intended to be revoked and canceled or not; so that we must consider the legal effect of the revoking clause, and the acts and statements of the maker of

the instrument made at the time of the indorsement as the determinative feature of the case.

Under the English statute of frauds, 29 Charles XI, chapter 3, it was provided, in substance, that "there should be no revocation of a written will, duly executed, except by burning, canceling, tearing, or obliterating." This statute is not in force in Tennessee, and the question in Tennessee, except in cases of revocation by means of a nuncupative will, under our statute (Shannon's Code, sec. 3900), is controlled by the rules of the civil and ecclesiastical laws, so far as they have become a part of the common law. The important question in all such cases is the intention of the testator. If the testator does some act entirely different from those mentioned in the statute, but with the full intention to revoke, it will be a revocation: Pritchard on Wills, sec. 266.

And so if he attempt to destroy the will with the purpose of revoking the will, but does not succeed, the act done is effectual to make the revocation; as, for instance, if the testator attempts to burn his will, and believes he has done ²³⁹ so, but by fraud of another a different paper is burned, it will be a revocation if the testator really intended it to be so, and honestly believed the will destroyed: *Smiley v. Gambill*, 2 Head, 164.

The question of the intention to revoke, and of the acts done to effect it, are for the jury, while the effect of the act done is a matter for the court. The facts being found, the court will decide whether or not they amount to a revocation: *Ford v. Ford*, 7 Humph. 104; *Smiley v. Gambill*, 2 Head, 168. The intention to revoke, and some act done to carry that intention into execution, must concur: Schouler on Wills, 3d ed., secs. 387, 388. A mere expression of an intention to revoke, without some act to carry it into effect, is not sufficient: *Allen v. Huff*, 1 Yerg. 409.

A written will of either personalty or realty cannot be revoked by mere parol: *Allen v. Huff*, 1 Yerg. 404; *Marr v. Marr*, 2 Head, 307, 308; *Rodgers v. Rodgers*, 6 Heisk. 496, 498; *Allen v. Jeter*, 6 Lea, 674.

If a maker of a will erase his signature, and afterward re-sign it without an intention to cancel, it will not amount to a revocation or cancellation, but if there is a burning, canceling, tearing, or otherwise destroying of the instrument, it will be sufficient: *Frear v. Williams*, 7 Baxt. 550, 553. ²⁴⁰ And if alterations and obliterations are made, with a view of after-

ward making a different disposition of the property, they will not amount to a revocation or cancellation if the subsequent disposition is not effectually carried out: *Stover v. Kendall*, 1 Cold. 560, 561.

It was held in Connecticut that the words, "this will is invalid," indorsed upon the back of an instrument, otherwise perfect as a will, was a sufficient cancellation or revocation, there being no statute in that state upon the subject: *Witter v. Mott*, 2 Conn. 67; *Card v. Guinan*, 5 Conn. 164, 167; *Pritchard on Wills*, sec. 271; *Graham v. Burch*, 28 Am. St. Rep. 344, 351, notes.

In the case at bar it is evident that the revoking clause was written by the testator and signed by him; that he afterward became dissatisfied with its contents, and intended to cancel and revoke it, and so stated to his wife, in the presence of his daughter, and that from that time forward he did not consider that it had any force or efficiency. The only circumstance militating against this view is that he placed the paper in a lock drawer, and kept it for sixteen years without destroying it, but this is counterbalanced by the proof that he did not treat it as being in effect, or refer to it as being still his will, nor did he erase the revoking clause, though it was in pencil and might easily have ²⁴¹ been obliterated, if he desired. Under all these circumstances we must hold that the will was revoked and canceled, and was not in effect at the death of R. Billington, and the judgment of the court below is affirmed with costs.

Revocation of Will.—The supreme court of Georgia has recently held that an unattested indorsement on a will in the testator's handwriting, that "This will is made void by one of more recent date," or "This, my will and testament, is of no avail, and is null and void," does not work a revocation of the instrument: *Howard v. Hunter*, 115 Ga. 357, 41 S. E. 638, 90 Am. St. Rep. 121, and note. See, on this question, the monographic note to *Graham v. Burch*, 28 Am. St. Rep. 350, 351.

RAILROAD v. KLYMAN.

[108 Tenn. 304, 67 S. W. 472.]

RAILROADS—Right of Passenger to Stopover.—A regular, full rate, noncoupon railroad ticket, in the absence of agreement, entitles the holder to a continuous passage only, and if a change of trains must be made, the journey must be continued on the next available train. Under such ticket the holder may begin the journey when he elects, but, having started, he is not entitled to subdivide the journey at will, or go otherwise than continuously from the initial point to the point of destination. (p. 757.)

RAILROADS—Rights Under Passenger Ticket.—In the absence of agreement, rule or regulation, the obligation created by the sale of a regular, full rate, noncoupon railroad ticket is for one continuous passage, and if the passenger voluntarily leaves the train at an intermediate station, while the carrier is engaged in the performance of the contract, he thereby releases it from further performance, and has no right to demand such performance on another train or at another time. (p. 758.)

RAILROADS—Wrong Reason for Rejection of Passenger Ticket.—If a railroad passenger ticket is invalid for any reason, the fact that the train conductor assigns a wrong reason for its rejection does not prevent the setting up of the invalidity of the ticket as a defense to an action to recover for a refusal to honor it. (p. 760.)

Washington, Allen & Rains and J. A. Ryan, for the plaintiff.

Smith & Maddin, for the defendant.

305 CALDWELL, J. The line of the Henderson division of the Louisville and Nashville Railroad Company, running north and south, crosses the line of its Memphis division, which runs east and west, at Guthrie, Kentucky. Russellville, Kentucky, is on the former line east of the intersection, and Nashville, Tennessee, is on the latter line south of the intersection. Passengers going from one of these points to the other must change cars, and have some delay at Guthrie, the place of intersection. August 10, 1898, the plaintiff, Solomon Klyman, took passage at Russellville for Nashville, and while awaiting the Nashville bound train at Guthrie, he received a message calling him in the opposite direction to Madisonville, Kentucky, whence he went to Louisville, Kentucky, and thence to Russellville, and on to Guthrie again by the same route as before. After this, on August 29th, of same year, he boarded the train at Guthrie and resumed his journey to Nashville. The conductor challenged his ticket, and, upon his refusal to pay

fare, stopped the train and was in the act of forcibly ejecting him, when a fellow-passenger paid his fare for him and he was carried safely to his destination. A few moments after his fare ³⁰⁶ was paid, he exhibited a large amount of money, and repaid the gentleman who had kindly advanced the fare for him. This suit was brought to recover damages for the attempted ejection; verdict and judgment were rendered for one hundred and fifty dollars in the plaintiff's favor, and the defendant appealed in error.

The rejected ticket was issued nineteen days before presentation. It was a first-class, regular, full rate ticket, calling for Nashville as the point of destination. It was lost before the trial, and the witnesses, while agreeing as to the facts just stated, were not in harmony as to the place of issuance.

The plaintiff testified that he bought a ticket from Russellville to Guthrie, and used it, and that while waiting at Guthrie, and before called to Madisonville, he bought the ticket now in question from Guthrie to Nashville, and kept it in his pocket until presented nineteen days later, but the defendant's witnesses testified that it was issued at Russellville, and used and punched to Guthrie on the day of issuance.

The plaintiff contended below, and contends here, that the ticket, being first-class, regular, and full rate, was good for passage when presented, whether issued at the one place or the other; while the defendant denied there, and denies here, that it was then good if issued at Russellville and not ³⁰⁷ presented on next train to Nashville, after being used to Guthrie.

The trial judge took the plaintiff's view and charged the jury as follows: "That if the plaintiff purchased a ticket at Guthrie for Nashville, and paid full fare for it, or if he purchased it at Russellville for Nashville, via Guthrie, as the road ran, at the full fare, that he was entitled to transportation from Russellville, or from Guthrie, to Nashville upon the same, no matter when presented, and if the defendant company, through its conductor, refused to accept the same for passage from Guthrie to Nashville, when offered and presented by plaintiff, and the conductor thereupon proceeded to eject, or attempted to eject, the plaintiff from the train, such action on his part was contrary to law, and that defendant would be liable for such."

This instruction, when applied, as it must be, to the facts and contentions heretofore recited, is erroneous in its alternative supposition. The ticket was not good for transportation

to Nashville when presented, if issued in ordinary form at Russellville and used to Guthrie nineteen days previously.

Such a ticket, if issued, was good only for a continuous passage from Russellville to Nashville by such connection as was made by the company's trains at Guthrie, and the plaintiff, having elected, if he did, to begin his journey on the ³⁰⁸ day of issuance, was legally bound to finish it by the first suitable train from Guthrie after his arrival there. The contract indicated by such a ticket was, in the absence of an agreement to the contrary, an entirety; and when performance was once commenced, both passenger and carrier were legally obliged to continue it until completed.

The contract operated on both alike. It gave the passenger no more power to break his journey into parts against the company's will than it gave the company to do the same thing against his will. It gave neither the right of severance and piecemeal performance, without the consent of the other; and no consent is shown or claimed.

The purchase of a full rate, through ticket from Russellville to Nashville, if made by the plaintiff, entitled him, under the authority of *Railroad Co. v. Turner*, 100 Tenn. 214, 47 S. W. 223, to elect when he would begin his journey, but it did not entitle him, under that or any other authority, of which we are aware, to subdivide his journey at will, or when started, to go otherwise than continuously from initial point to ultimate destination.

The law implies the right of an election between times for embarkation from the very sale of such a ticket, and it likewise, for a similar reason, implies the duty of continuous passage ³⁰⁹ from the very fact of its commencement. As the sale of such a ticket, nothing else being said, affords an inference that the purchaser may start when he pleases, so his starting, without an agreement to the contrary, affords an inference that he will go directly to the end of his journey.

The company must receive him upon its regular train whenever he sees fit to start, and, having started, he must make a continuous passage, no agreement to the contrary having been made in either instance. These rights and duties lie at the foundation of the contract, and are reciprocal.

Only a few of the many authorities upon the subject will be cited.

"The performance of the contract for carriage evidenced by the ticket, it has been held, must be demanded by its holder

as an entirety when there is no express agreement upon the subject on the ticket or with the agent of the company, with competent authority to make it. If, therefore, by its terms, the ticket is for passage from one point to another, when the journey has been once commenced, it must be continued without intermission until the destination named in the ticket has been reached, and the passenger cannot claim the right to stop at any intermediate place and continue his trip upon a subsequent train of the same company, with the same ticket, unless the ³¹⁰ carrier has failed to carry him with that reasonable dispatch which he had the right to demand": Hutchinson on Carriers, 2d ed., sec. 575, p. 658.

"As a general rule, one who purchases a through ticket is bound to pursue the usual and direct route over the company's road, and is not entitled to go by way of a longer and more circuitous line owned by the same company, nor is he entitled to stop over on the way unless given that privilege": 4 Elliott on Railroads, sec. 1595, p. 2885.

"A passenger, having used a through ticket to an intermediate station, has no right on such ticket to resume his journey": Ray on Passenger Carriers, 520.

These authors are supported by the adjudged cases which they cite, and others.

In Wyman v. Northern Pac. R. R. Co., 34 Minn. 210, 25 N. W. 349, 22 Am. & Eng. R. R. Cas. 403, 404, the court said: "The general rule, in the absence of any statute changing it, is that the contract of conveyance between a carrier and a passenger is an entirety. Neither party can require the other to perform it in parts. Where a passenger has selected his train and entered it, and commenced his journey, he has no right to leave it at an intermediate point without the carrier's consent, ³¹¹ and afterward demand the contract be completed on another train."

One of the headnotes to the case of Hatten v. Railroad Co., 39 Ohio St. 315, as reported in 13 Am. & Eng. R. R. Cas. 53, is as follows: "In the absence of any agreement, rule, or regulation to the contrary, the obligation created by the sale of the ticket was for one continuous passage, and if the passenger voluntarily left the train at an intermediate station, while the carrier was engaged in the performance of the contract, he thereby released it from further performance, and had no right to demand such performance on another train or at another time."

The rule, with the reason for it, is stated in another case in these words, viz.:

"The contract between the parties is, that upon the payment of fare, the company undertakes to carry the passenger to the point named, and he is furnished with the ticket as evidence that he has paid the required fare, and is entitled to be carried to the place named.

"When the passenger has once elected the train on which he is to be transported, and entered upon his journey, he has no right, unless the contract has been modified by competent authority, to leave the train at a way station, and then take another train on which to complete his journey, but is bound by the contract to proceed ³¹² directly to the place to which the contract entitled him to be taken.

"Having once made his election of the train and entered upon the journey, he cannot leave that train, while it is [operated] in a reasonable manner within the undertaking of the carrier, and enter another train, without violating the contract he has entered into with the company": *McClure v. Philadelphia etc. R. R. Co.*, 34 Md. 532, 6 Am. Rep. 345.

Adjudications to the same effect could be multiplied at great length, but that is not necessary. Many of the other cases are collected in a footnote to *Walker v. Wabash etc. Ry. Co.*, 15 Mo. App. 333, 16 Am. & Eng. R. R. Cas. 386.

It is due to say that we are not dealing, in this case, with a coupon ticket, in respect of which, as a whole, the rule is different, allowing, as it does, as many breaches in the journey, or as many stopovers, as there are coupons.

Of such a ticket each coupon is said to stand as a separate ticket between its own initial and ultimate points, and passage upon any particular coupon, when begun, is required to continue to its end, unless otherwise agreed. The authorities upon the use of the coupon ticket illustrate and reinforce the doctrine herein applied to the case in hand.

Hutchinson on Carriers, section 577, says: "A well-recognized distinction exists, however, ³¹³ between the ordinary ticket of the carrier, which binds it to carry from point to point upon its own road, and tickets which entitle the holder not only to passage over the line of the company issuing them, but also over other connecting lines over which it is necessary for him to pass in order to reach his destination, and which are issued in what is called the coupon form, and are denominated coupon tickets.

"When the carriage contemplated is confined to the line which issues the ticket, it is a contract solely with that line to carry the holder according to its terms, and when the transportation is once begun, both parties are held to a continuous performance until it is completed, unless otherwise agreed."

Another learned author employs this language, namely: "As we shall see, a through ticket over several lines does not require the passenger to make a continuous trip over all such lines without stopping, but it does usually require him, after he has commenced his journey on any one of them, to complete it as far as he is going upon that particular line. So an ordinary ticket over one line is for a continuous trip, and if the passenger voluntarily leaves the train upon which he has commenced it, at an intermediate point, he cannot resume it by virtue of such ticket, contrary to the rules of the company, on another train, or at another time": 4 Elliott on Railroads, ³¹⁴ sec. 1595, p. 2491. See, also, 4 Elliott on Railroads, sec. 1596, and *Auerbach v. New York Cent. etc. R. R.*, 89 N. Y. 281, 42 Am. Rep. 290.

But the plaintiff contends, further, that the railway company was in no aspect of the case entitled to the benefit of the continuous passage doctrine, because the conductor, upon declining the ticket, said that he did so upon the ground that it was out of date, and thereby estopped the defendant from justifying its rejection on any other ground; and to sustain this contention, *Railway Co. v. McCarthy*, 96 U. S. 267, 268, is cited. In that case the carrier, after proving that it was unable to keep its contract to forward cattle on Sunday, for want of cars, was not allowed to change the grounds for the breach and say the law forbade the shipment on the Sabbath. The court, in the opinion, said: "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground and put his conduct upon another and different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law": *Railway Co. v. McCarthy*, 96 U. S. 267, 268.

That principle, however, was held in *Ault v. Dustin*, 100 Tenn. 366, 45 S. W. 981, not to preclude a person, who had first insisted that his contract had been canceled, from defending a suit upon the ³¹⁵ ground that the other party had breached the contract.

A fortiori does it not stand in the way of the interposition of the continuous passage doctrine in the present case. On the defendant's theory of the facts, the ticket had become invalid for any and every purpose, and, that being true, no particular legal importance should be attached to the reason assigned by the conductor for its rejection. If the ticket was invalid, it can make no difference that a wrong reason, as plaintiff contends, was assigned for its invalidity. Whatever the reason given, the fact of invalidity and the plaintiff's lack of right to proceed remain the same.

In reality, however, the reason actually assigned embraces the present insistence of the defendant. If, in fact, the ticket was purchased at Russellville, for Nashville, and used to Guthrie on the 10th of August, it was out of date when offered for passage from Guthrie to Nashville on the 29th of the same month, and that was a good and sufficient legal reason for rejecting it.

Reverse and remand.

Railway Ticket.—Without any express rule or regulation on the part of a railway company, the contract of a passenger for transportation from one point to another, where there is no usage or stipulation to the contrary, is an entire contract, and entitles him merely to one continuous passage, and not to a succession of journeys at his own convenience from one intermediate station to another until his final destination is reached: See the monographic note to *Cheney v. Railroad Co.*, 45 Am. Dec. 193. The holder of a coupon ticket, however, may be entitled to stopover privileges: *Spencer v. Lovejoy*, 96 Ga. 657, 51 Am. St. Rep. 152, 23 S. E. 836.

GOODWIN v. RAY.

[108 Tenn. 614, 69 S. W. 730.]

BAILEMENTS.—The Statute of Limitations does not begin to run in favor of a bailee and against a bailor until the latter has made demand, when the bailment is gratuitous, and the bailee holds specific property for the benefit of the bailor without permission or authority to use it. (pp. 762, 763.)

J. M. Troutt, for the plaintiff.

C. G. Bond, for the defendant.

⁶¹⁴ WILKES, J. This is an action begun before a justice of the peace upon a writing in the following words and figures:

⁶¹⁵ "Phoebe Goodwin, colored, has one hundred and twenty dollars in the safe for her benefit. February 20, 1888. This is all she has at this time. J. O. RAY."

Phoebe Goodwin died in 1901, and James Goodwin is her administrator. After his qualification as such administrator he made demand of the defendant Ray for the money, and it being refused, suit was brought. Defendant claimed to have paid the amount to Phoebe Goodwin in her lifetime, but there is no evidence except his own testimony to that effect, and this was by the court excluded.

In the circuit court the cause was tried before a jury. The trial judge, among other things, charged: "I charge now that this paper created as between Ray and Phoebe Goodwin a bailment, and the defendant would have the money in his possession as a gratuitous bailee, and the said Phoebe Goodwin had the right at any time after thus depositing her money to go and demand it from the defendant, and the statute of limitations would commence running from the time she had the right to demand the money, and not from the date of any demand made by her or by the plaintiff, and no demand was necessary to put the statute of limitations in force," etc.

This is assigned as error. The learned judge was no doubt guided in his action by the statute (Shannon's Code, sec. 4477), which is in these words: "When a right exists, but a demand is necessary ⁶¹⁶ to entitle the party to an action, the limitation commences from the time the plaintiff's right to make the demand was completed, and not from the date of the demand."

Whatever may be the proper construction of this statute, and when the "right to make the demand may be completed" in the sense of the statute, we need not decide, as we are of opinion the statute does not apply to a case like this.

This is a special deposit of specific money made for the benefit of the depositor and as her property. No permission or authority is expressly or impliedly given to the bailee to use it. He is, when the money is received, a gratuitous bailee, holding the specific property in his safe for the benefit of the bailor. He does not in any sense become debtor of the bailor. If the money is lost without negligence on his part, there is no liability on him to replace it, but unless it is so lost his obli-

gation is to return it on demand. Until demand made, no right of action accrues: *Moore v. Fitzpatrick*, 7 Baxt. 350. Until such demand and refusal, the statute of limitations does not begin to run.

It is true there are many cases of bailment in which the statute does run and where no demand is necessary either to authorize suit or to put the statute in operation, as, for instance, when the bailment is for a definite time, or when the bailee converts the property, and this becomes known to the depositor, or when an adverse claim is set up by ⁶¹⁷ the bailee and made known to the depositor, and other cases. In such cases the bailee puts himself in the attitude of converting the property and becoming debtor to the depositor, and the right of action accrues without demand. But in the present case the relation of creditor and debtor does not exist before demand made, and the statute does not apply, because of the nature of the transaction and the relative right and obligation of the parties.

The judgment of the court below is reversed and cause remanded for a new trial. The appellee will pay costs of appeal.

The Statute of Limitations does not begin to run in favor of a bailee until he denies the bailment and converts the property to his own use: *Reizenstein v. Marquardt*, 75 Iowa, 294, 9 Am. St. Rep. 477, 39 N. W. 506.

RAILROAD v. BENTZ.

[108 Tenn. 670, 69 S. W. 317.]

JUDGMENTS OF NATIONAL COURTS as Res Judicata in State Courts.—If a judgment in favor of plaintiff in a national court is reversed on appeal, and the cause remanded for a new trial, whereupon plaintiff takes a voluntary nonsuit and brings a new action in the state court, the judgment of the national court is not conclusive, either as *res judicata*, or as a declaration of the law of the case, in the prosecution of the latter action. (p. 767.)

MASTER AND SERVANT—Fellow-servants.—The negligence of a railroad telegraph operator in transmitting running orders to men in charge of a train is not one of the risks assumed by the latter, as they are not fellow-servants with such operator. (pp. 767. 768.)

DAMAGES for Loss of Advice, Counsel, Comfort and Enjoyment resulting from a husband's death, caused by the negligent act of another, cannot be recovered by his widow. (p. 768.)

Hays & Biggs, for the plaintiff.

C. G. Bond, for the defendant.

⁶⁷¹ BEARD, J. Edward Bentz was engineer on freight train No. 84, which left Jackson at 2:40 o'clock on the morning of the 10th of June, 1897, destined for Mounds, Illinois. The train approached Milan about 4:20 A. M. There the engineer blew for the semaphore signal, which was set at red, and failed to receive the white signal in reply. Advancing his train still nearer, he blew again, when, according to the evidence of plaintiff below, the red signal turned to white. This, under the rules of the railroad, indicated that there were no orders and that the track was clear for him to go ahead. Upon receiving his signal, he moved his train north, and, while running at a moderate speed around a curve of the railroad, about 5:20 A. M., at a point north of Idlewild, he had a head-end collision with train No. 81, moving south. When this collision was ⁶⁷² clearly inevitable, Bentz jumped, to save his life, and in doing so received mortal injuries, from which death ensued. This suit was brought by his widow to recover damages for his death, which is attributed, in the declaration, to the negligence of the railroad company. The act of negligence complained of is that, at 4:37 A. M., after train No. 84 had passed Milan, the train dispatcher of plaintiff in error at Jackson, whose duty it was to regulate the movement of its trains, inquired of its local operator at Milan as to whether Bentz's train had passed that point, and the operator replied that it had not, and, acting on this information, the train dispatcher gave an order to the south-bound train, No. 81, then at Martin awaiting orders, to meet north-bound train, No. 84, at Idlewild, and at the same time gave the same order to the Milan operator, to be delivered to train No. 84 when it reached that point. Train No. 81 received this order, and was on its way to Idlewild when the collision occurred, but train No. 84 did not, as the order reached Milan a few minutes after No. 84, in answer to the white light displayed on the semaphore, had passed that point. This semaphore was under the control of this operator, and its movements were regulated by a rope which passed from it into the office occupied by him. There was a verdict and judgment for the plaintiff below, and the case has been brought to this court by the defendant company.

A number of errors are assigned upon the action ⁶⁷³ of the trial court. The first of these is that, upon motion of the plaintiff below, the court struck out a plea in which the defendant averred that, prior to the bringing of the present suit, the plaintiff, Mrs. Bentz, had brought her action against the

defendant in the circuit court of Madison county, in this state, seeking to recover damages for the same cause of action that this suit was instituted for; that thereafter the defendant, under the act of Congress in such case made and provided, had that cause removed to the United States circuit court for the eastern division of the western district of Tennessee; that, in said court, upon an issue involving the question of liability of the defendant for the same act of negligence herein alleged and the injury consequent therefrom, there was a trial and verdict in favor of the plaintiff; that, on a writ of error prosecuted from the judgment thereon to the United States circuit court of appeals, sitting at Cincinnati, Ohio, that court adjudged that the jury, on the facts of the case, "because the injury occurred through the negligence of a fellow-servant [the telegraph operator at Milan] of the plaintiff's husband," should have been directed to bring in a verdict for the defendant, and thereupon reversed the judgment of the lower court and remanded the case for a new trial; that a mandate issued to the circuit court for a new trial in accordance with this adjudication, and that, in the midst of the trial so ordered, and before its conclusion, the plaintiff, ⁶⁷⁴ over the objection of the defendant, was permitted to take a nonsuit, and thereafter instituted the present action. Upon this state of facts, it was averred the matters involved had been conclusively adjudicated against the plaintiff.

Was the court in error in striking out this plea? While, in the plea, this action of the United States circuit court of appeals is alleged to be *res adjudicata* of the question of the railroad's liability to the defendant in error for the loss resulting from the negligence of the telegraph operator and manager of the semaphore, yet, in the argument of counsel in support of the assignment of error, the claim is somewhat abated, and it is now insisted that its legal effect is that, upon the reopening of the facts between the same parties in the state courts, it is the law of the case that, while not a bar to the action, it is conclusive upon the parties, so far as the question of liability rests upon the alleged negligence of the operator.

Many authorities are relied upon for this contention, but, so far as our examination has extended, they do not support it. Among them are some like *Supreme Lodge Knights of Pythias v. Lloyd*, 107 Fed. 70, and *Collins v. Insurance Co.*, 91 Tenn. 432, 19 S. W. 525, where the court has held that the principles announced upon the first appeal constitute the law

of the case upon a second appeal. However sound this rule is when applied to a suit that has once had the law declared in it by an appellate court and ⁶⁷⁵ is remanded, and, after a second trial in the court below, once more reaches the court of appeals, we do not see upon what grounds it is to be made to apply, after a voluntary dismissal by the plaintiff, to a new suit instituted in an independent forum. Nor do we think that *Jacobs v. Marks*, 182 U. S. 583, 21 Sup. Ct. Rep. 865, *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 20 Sup. Ct. Rep. 506, *Pittsburgh etc. R. R. Co. v. Long Island etc. Trust Co.*, 172 U. S. 493, 19 Sup. Ct. Rep. 238, and *Crescent City Livestock Co. v. Butchers' Union etc. Co.*, 120 U. S. 141, 7 Sup. Ct. Rep. 472, furnish any aid to this contention. It is unnecessary here to enter upon an analysis of these cases. It is sufficient to say that they are clearly distinguishable from the one at bar.

On the other hand, *Bucher v. Cheshire R. R. Co.*, 125 U. S. 555, 8 Sup. Ct. Rep. 974, and *Gardner v. Michigan Cent. R. R. Co.*, 150 U. S. 349, 14 Sup. Ct. Rep. 140, if not in express holding, at least by clear intimation, are contra to the view pressed by plaintiff in error. In the first, the plaintiff had sued in the state court and recovered a judgment, which, on appeal to the supreme court, was reversed and the case remanded for a new trial. The plaintiff then took nonsuit, and brought a new suit for the same cause of action and against the same defendant in a United States court. The action was one for personal injuries, received while the plaintiff was traveling on Sunday, in violation of a Massachusetts statute. It was insisted that the holding of the supreme court of that state, that the plaintiff was not, at the time of his injury, traveling from ⁶⁷⁶ necessity or charity on the Lord's day, but on secular business, was an estoppel on him in the United States court, notwithstanding the subsequent nonsuit. But this insistence was not sustained, and, in regard to it, Judge Miller, delivering the opinion of the court, said: "It is not a matter of estoppel which bound the parties in the court below, because there was no judgment entered in the case in which the ruling of the state court was made, and we do not place the correctness of the determination of the circuit court, in refusing to permit this question to go to the jury, upon the ground that it was a point decided between the parties, and, therefore, *res adjudicata* as between them in the present action, but upon the ground that the supreme court of the

state, in its decision, had given such a construction to the meaning of the words 'charity' and 'necessity' in the statute as to clearly show that the evidence offered upon the subject was not sufficient to prove that the plaintiff was traveling for either of these purposes."

This paragraph, from the opinion of Miller, J., is embodied in that of Fuller, C. J., in *Gardner v. Michigan Cent. R. R. Co.*, 150 U. S. 349, 14 Sup. Ct. Rep. 140. The opening statement of the chief justice in this last opinion is sufficient to our present purpose. "Counsel for plaintiff in error does not contend that the judgment of the supreme court of Michigan operated as a bar to this action, but he insists that that judgment precluded 'the plaintiff from successfully maintaining ⁶⁷⁷ a new action against the defendant upon evidence tending to prove only the same state of facts which the evidence before the supreme court of the state tended to prove.' This," continued the court, "assumes a final adjudication on matter of law, binding between the parties, and treating the judgment reversing and remanding the cause as final, applies it as an estoppel, notwithstanding the fact that a nonsuit was subsequently taken. We cannot concur in this view."

We think, on principle and authority, a nonsuit decides nothing, but leaves the parties, as they began their litigation, at arm's length. "Under no circumstances," says Mr. Freeman in volume 1, section 266 of his work on Judgments, "will a judgment on nonsuit be deemed final." Leaving the controversy indeterminate between the parties, it not only cannot support the plea of *res adjudicata*, but the reasoning and opinion of the court, in reversing, cannot have the effect of binding in subsequent litigation as the "law of the case": *Fish v. Parker*, 14 La. Ann. 491.

It was with this view that this court, speaking through McAlister, J., in *Hooper v. Railroad Co.*, 106 Tenn. 28, 60 S. W. 607, quoted approvingly from *Gassman v. Jarvis*, 100 Fed. 146, as follows: "When a cause of action, removed into a court of the United States, is dismissed therefrom without a trial or determination of the merits, the right of action still remains in full force and vigor, unaffected thereby, ⁶⁷⁸ and the party having such right of action may bring suit thereon in any court of competent jurisdiction, the same as though no previous suit had been brought."

This being the effect of the nonsuit in the United States circuit court, it left the trial court in the present action free

to apply the rule, well established in this state, that the negligence of a railroad telegraph operator is not one of the risks the trainmen assume, as they are in no legal sense fellow-servants: *Railroad Co. v. De Armond*, 86 Tenn. 73, 6 Am. St. Rep. 816, 5 S. W. 600; *Railroad Co. v. Jackson*, 106 Tenn. 438, 61 S. W. 771. It follows, therefore, that this assignment of error must be overruled.

An assignment is made upon the following paragraph of the trial judge's charge: "You also look to the loss of the aid—I don't mean pecuniary aid, but the aid of advice and counsel that the plaintiff, Mrs. Bentz, has sustained by virtue of his death, and also look to the loss of comfort and enjoyment that she has lost as a result of his death—look to the comfort and enjoyment of his society. Now, these are the elements of damages to be considered by the jury in determining what amount of damages to allow her, if you find in favor of the plaintiff."

We think this error is well assigned. In *Railroad Co. v. Wyrick*, 99 Tenn. 509, 42 S. W. 434, it was said that under chapter 186 of the acts of 1883, which provided for a recovery of "damages resulting to the parties for whose use and benefit the right of action survives ⁶⁷⁹ from the death consequent upon the injuries received," the widow could only recover her pecuniary loss on the death of her husband, and that case was reversed because the trial judge had said to the jury upon the measure of damages "that they could look to the mental and physical suffering of the surviving widow." The court there quoted approvingly from the opinion of Sharswood, J., in *Pennsylvania R. R. Co. v. Butler*, 57 Pa. St. 335, in which it is said that solatium for distress of mind is not a proper element in fixing the amount of the survivor's personal loss. In the present case, the learned trial judge, evidently by an inadvertence, excluded from the jury all consideration of the widow's pecuniary loss, and told them "to look to the loss of comfort and enjoyment" sustained by her, from the negligent fatal injury (if such it was) to her husband. It is insisted, however, that though this be error, yet there should be no reversal of this case, as upon the facts disclosed it is evident that the amount of damages allowed by the jury fall short of the value of the life of the deceased. This may be true, yet we find this affirmative error in the record. It is impossible for this court to say how much, if anything, was allowed for the loss of the enjoyment of her husband's society. There is no basis for speculation, even if

we were inclined to so indulge ourselves. In addition, the matter of estimating damages, upon a legal basis, was for the jury, and we do not feel at liberty to usurp their function.

680 Other assignments of error were made, and these have been disposed of orally.

The result is that for the error indicated, the judgment is reversed and the cause remanded for a new trial.

As to Whether the Decisions of the Federal Courts are res judicata and binding on state courts, see People v. Budd, 117 N. Y. 1, 15 Am. St. Rep. 460, 22 N. E. 670, 682; Commonwealth v. Douglas, 100 Ky. 116, 66 Am. St. Rep. 328, 24 S. W. 238. They are binding when exactly the same question of a federal nature is involved: State v. Ardoin, 51 La. Ann. 169, 72 Am. St. Rep. 454, 24 South. 802; Fox v. State, 89 Md. 381, 73 Am. St. Rep. 193, 43 Atl. 775. But in questions of local law, the decisions of the courts of the state will be followed by its courts in preference to those of the United States: Stalker v. McDonald, 6 Hill, 93, 40 Am. Dec. 389.

INSURANCE CO. v. DUNSCOMB.

[108 Tenn. 724, 69 S. W. 845.]

INSURANCE, LIFE.—A Creditor has an Insurable Interest in the life of his debtor to the extent of the indebtedness. (p. 772.)

INSURANCE, LIFE—Insurable Interest—Statute of Limitations.—If a creditor takes insurance on the life of his debtor, either as payment or as collateral security, the fact that the debt is barred by limitation at the time the insurance is taken, or becomes barred or affected with a presumption of payment before the policy becomes payable, does not prevent the creditor from recovering the insurance, either as against the insurer or the personal representatives of the insured. (pp. 772, 774.)

INSURANCE, LIFE—Insurable Interest—Statute of Limitations.—The fact that the debtor may be armed with a legal defense, such as the statute of limitations, against the creditor, does not destroy the insurable interest of the latter in the life of the former, either as absolute payment or as collateral security, nor defeat his right to recover on insurance on the debtor's life in his favor. (p. 773.)

THE PRESUMPTION of Payment of a Debt, arising after sixteen years from its maturity, may be rebutted by any satisfactory evidence that the debt is still due. The condition of the debtor as to solvency, and the possession by the creditor of the evidence of the debt and valuable collateral security may repel the presumption of payment. (pp. 774, 775.)

PLEA OF PAYMENT Admits the Debt and places the burden of proving payment on the defendant. (p. 775.)

INSURANCE, LIFE—Reimbursement for Premiums Paid.—An assignee of a life insurance policy who pays premiums thereon is entitled to reimbursement therefor out of the proceeds of the policy, with interest. (p. 776.)

CORPORATIONS—Right to Recover Assets of Extinct Corporation.—Personal representatives of the deceased stockholders of an extinct corporation are entitled to recover the proceeds of a life insurance policy held by the corporation as collateral security, to the extent of the debt, for pro rata distribution according to the interests of their several intestates after the payment of the debts of the corporation. (pp. 776, 777.)

F. Fentress, for the plaintiff.

H. Cary and R. P. Cary, for the defendant.

⁷²⁵ **WILKES, J.** The De Soto Bank of Memphis was, on March 16, 1881, an incorporated bank under ⁷²⁶ the laws of the state of Tennessee. Its charter expired by limitation on March 20, 1883, but under our statute it continued to exist for five years, or until March 20, 1888, for the purpose of settling its business, disposing of its property and dividing its capital stock, and on the 20th of March, 1888, it became extinct.

On March 5, 1870, Ben K. Pullen applied to complainant for insurance on his life, and, in accordance with the application, complainant, on March 8, 1870, issued its policy No. 101,367 for \$5,000, payable "to the order of the De Soto Bank of Memphis, Tennessee, to the amount of the insured's indebtedness to said bank, the balance, if any, to his legal representatives."

On February 28, 1881, the De Soto Bank was the holder of the following notes made by Ben K. Pullen:

One dated March 7, 1874, for.....	\$241.83
One dated March 8, 1875, for.....	153.39
One dated March 8, 1876, for.....	150.74
One dated March 8, 1877, for.....	148.04
One dated March 8, 1878, for.....	148.04
One dated March 8, 1879, for.....	139.67

Making a total, exclusive of interest, of.....\$982.71

On said date (February 28, 1881) the De Soto Bank, in writing surrendered said policy No. 101,367 to complainant, and in this surrender Pullen joined. The consideration for the surrender was the issuance of paid-up policy No. 161,122, for \$1,627, ⁷²⁷ payable to the De Soto Bank of Memphis, Tennessee, to the amount of the insured's indebtedness to said bank, balance, if any, payable to the insured's legal representatives."

Pullen died July 15, 1900. At the time of the legal death of the bank, its stock was owned by four individuals, as follows: James Elder, \$50,000; W. H. Wood, \$50,000; John B. Leach, \$70,000; S. H. Dunscomb, \$65,000. The wills and letters of administration show that all these parties died prior to 1900.

Their legal representatives, on December 19, 1900, filed a bill in the Shelby chancery court, seeking to enforce the collection from complainant therein of said paid-up policy No. 161,-122. On January 3, 1901, complainant filed this bill, as one of interpleader, and enjoined the prosecution of the first suit. To this bill the rival claimants of the fund made answer, and the chancellor, upon the hearing, decreed in favor of the bank's stockholders, or their representatives. The heirs of Ben K. Pullen, and the administrator, bring the case here by appeal, and assign errors. The first and second assignments of error are based upon the assumption that the chancellor held the notes executed by Pullen were not barred by the statute of limitations, or that they could not be presumed to be paid from the lapse of time. The decree of the chancellor does not recite or show that it is based upon any theory of this kind, but is based upon a different ⁷²⁸ idea, but which, to some extent, involves the questions in these assignments.

The questions really adjudged by the chancellor are that the bill was properly filed as a bill of interpleader, and that the representatives of the stockholders of the expired bank were entitled to the proceeds of the insurance policy. As to the first of these propositions, there is, and can be, no serious controversy, and the last proposition is raised by the third and fourth assignments of error. Incidentally, however, we must notice the matters presented on the first two assignments. It is proper to note in the outset that this is not a suit on the notes of Pullen to enforce their collection. The defense of the statute of limitations and presumption as to payment, as to them, is not, therefore, raised, and cannot be in this suit as a defense to them, and the notes are only important so far as they bear upon the question of the right of the bank or its representatives to the proceeds of the policy. It will be conceded at once that the insurance company could not interpose any defense of the statute of limitations or presumption of payment to a suit upon its policy. The right of action against it on the policy did not accrue until the death of Pullen in 1900. The policy is payable to the bank direct, to the extent of Pullen's indebtedness to it, and the bank had, therefore, an insurable interest in Pul-

len's life when the policy was taken out, and afterward, in any event, while the debts were subsisting. The ⁷²⁰ record leaves the matter in some doubt as to the terms upon which the bank held this policy—that is, whether an absolute payment of Pullen's indebtedness, or as a collateral security for the same.

On March 30, 1900, J. S. Dunscomb wrote to Ben K. Pullen, saying: "I find amongst my father's papers a memorandum of a policy he has on your life. I would like to know the full history of it." On April 27th, Pullen answered that he had given the De Soto Bank a policy on his life as a sort of indemnity against loss in case of his death; and he further states that in the course of time his inability to pay premiums had doubtless caused it to lapse.

Now, in either event the bank could, other things being out of the way, recover upon the policy as it had an insurable interest to the extent of its debt in Pullen's life.

In the case of *Rawls v. American etc. Co.*, 27 N. Y. 282, 84 Am. Dec. 280, Rawls had procured a policy for \$5,000 on the life of Fish, payable to Rawls himself. Among other defenses, the company plead that Rawls had no insurable interest in the life of Fish, and that any debt due from Fish to Rawls had long since been barred by the statute. It was shown that Rawls had a valid debt when the policy was issued, and the court held: "Regarding the policy in this case as substantially a contract of indemnity against the loss of the plaintiff's debt, and that, as an interest was required to support its inception, ⁷²⁰ a continuance of that interest is essential to its perpetuity, there was no pretense that the debt, or any part of it, had been paid. All that the case showed was that the statute of limitations had apparently run against the demand of the plaintiff at the death of Fish. But suppose the statute had attached, the interest of the plaintiff as a creditor in the continuation of the life of his debtor had not ceased entirely. The debt was not extinguished as in a case of payment. It might be renewed by a new promise—and indeed without such promise—and be enforced by action, unless the defense of the statute was directly interposed. It is not a legal presumption that when the statute of limitations has once run, the debtor will refuse to revive the debt by a new promise, or interpose the defense of the statute in an action to recover it."

A leading case upon the question is *Dalby v. Insurance Co.*, 15 Com. B. 365, 80 Eng. C. L. Rep. 364, where it is held that "where a policy effected by a creditor on the life of his debtor

is valid at the time it is entered into, the circumstance of the interest of the assured in such life ceasing before the death does not invalidate it." This case is cited approvingly in *Olmsted v. Keyes*, 85 N. Y. 598.

In *Curtiss v. Aetna Life Ins. Co.*, 90 Cal. 249, 25 Am. St. Rep. 114, 27 Pac. 211, it was contended that the claim of the creditor was barred by the statute of limitations at the time of the death of the debtor, and that, therefore, the creditor had no insurable interest and could not recover. The ⁷³¹ court held: "A debt, even though not legally collectible by reason of the bar of the statute, gives an insurable interest."

"The fact that the debtor may be armed with a legal defense against the creditor does not destroy the insurable interest of the latter in the life of the former. The debtor may be an infant, and yet the fact that the plea of infancy might be interposed would not make the life policy in favor of his creditors void. If the debt be barred by the statute of limitations, it nevertheless constitutes an insurable interest": *Manhattan Life Ins. Co. v. Hennessey*, 99 Fed. 64, 39 C. C. A. 632.

The same rule is stated with equal clearness in 1 May on Insurance, third edition, section 108. But if we treat the policy as only a collateral security, and not the absolute property of the bank, what are the rights of the parties? "Whenever collateral security is given for a debt, the collateral will continue as a security until the debt is satisfied, unless both parties to the original contract agree to its surrender, or the pledgee, in some other way, discharges or releases it": *Colbrooke on Collateral Securities*, 2d ed., 191, and note, citing *Williams v. National Bank*, 72 Md. 441, 20 Atl. 191.

"The statute of limitations defeating simply the remedies upon a debt does not operate in law as a discharge of the debt itself, which remains, so that, where negotiable instruments have been deposited as collateral security for the payment of a loan or ⁷³² debt, the pledgee is entitled to retain possession of the same as against the pledgor, notwithstanding the statute of limitations might be pleaded to an action on the original debt": *Colbrooke on Collateral Securities*, 2d ed., citing *Choteau v. Allen*, 70 Mo. 290.

"Since statutes of limitation, except in special cases, bar the remedy merely, and do not destroy the right, it is a generally accepted principle that, where the security for a debt is a lien on property, real or personal, the fact that the right of action on the principal obligation is barred does not impair the remedy

at law or in equity to enforce the lien, to which a different limitation may be applicable. By analogy to the rule that, where a plaintiff has two remedies for the same right, the bar of one does not affect his right to exercise the other, a creditor may enforce a lien upon the security, although the virtual effect may be that he will enforce payment of a barred obligation": 19 Am. & Eng. Ency. of Law, 2d ed., 177.

"The holder of a note with whom collaterals have been deposited has, while the statute is running, two remedies—one against the maker, by suit; the other against the collaterals. If he loses the first by lapse of time, he still has the second. He may not sue the maker, but he may exhaust the securities he holds in pledge, for the statute operates not upon his debt, but upon his right of action": *Hartranft's Estate*, 153 Pa. St. 530, 34 Am. St. Rep. 717, 26 Atl. 104.

Suppose that Pullen, before his death, had sought ⁷³³ to recover this policy from the bank, on the ground that the debt for which it was deposited or pledged was barred by the statute of limitations. Could he have maintained such suit? We think not: 19 Am. & Eng. Ency. of Law, 2d ed., 178; *Hudson v. Wilkinson*, 61 Tex. 607.

It is a familiar doctrine that, though a debt may be barred by the lapse of six years, so that no personal judgment may be taken on it, a mortgage executed to secure such debt could still be enforced, and the same reasoning and rules apply as against any presumption of payment by the lapse of time. This assignment is based on the idea that the notes not sued on should have been presumed by the chancellor to have been paid. Payment of a debt may be presumed after a lapse of sixteen years from its maturity. But this is a rebuttable presumption, and may be overcome "by any evidence tending to satisfy the court that the debt is still due. The condition of the debtor as to solvency, or other circumstances, may repel the presumption": *Stanley v. McKinzer*, 7 Lea, 457. See, also, *Husky v. Maples*, 2 Cold. 25, 88 Am. Dec. 588; *Yarnell v. Moore*, 3 Cold. 173; *Lyon v. Guild*, 5 Heisk. 175; *Carter v. Wolfe*, 1 Heisk. 700; *Fisher v. Phillips*, 4 Baxt. 243; *Anderson v. Settle*, 5 Sneed, 202.

In *Stanley v. McKinzer*, 7 Lea, 457, and *Anderson v. Settle*, 5 Sneed, 202, the debts were over twenty years old.

The notes held by the De Soto Bank were made in March, 1874, 1875, 1876, 1877, 1878, and 1879. ⁷³⁴ They were not paid in 1881, for, on the 28th of February of that year, Ben K. Pullen signed the surrender of the original policy, No. 101,-

367, and had the insurance company issue paid-up policy No. 161,122, payable to the De Soto Bank, to the amount of its indebtedness, thus recognizing a debt at that date.

The production of any direct or positive evidence as to the actual fact of payment or nonpayment of this indebtedness has been rendered impossible by the long lapse of time and the death of every stockholder in the bank, and especially Mr. Dunscomb, Sr., and Mr. Elder who had the assets of the bank in charge. Five witnesses, however, testify to the fact that Pullen was a man of slender means. These gentlemen all show that he was hardly at any time able to meet more than the ordinary demands of life, and, from the statement which they make it is practically impossible to believe that he was ever, at any time, in a condition to enable him to pay his debts. It is shown that his salary, for a good portion of the time, came from the city government, in whose employ he was, and this, of course, was exempt. Mr. Speer, who is an abstractor in the abstract office of the Title Guarantee and Trust Company, states that the records show no conveyance, at any time, of any real estate to Mr. Pullen. Pullen himself says, in his letter of April 27, 1900, that, "in the course of time, my inability to pay the premiums caused it [the policy] to lapse."

⁷³⁵ From this evidence, it is hardly conceivable that the notes were ever paid; but, independent of this evidence, the mind can hardly avoid the irresistible conclusion that they are still unpaid, when it is remembered that the notes and policy remained in the hands of the stockholders of the bank from their execution up to the present time. Men do not pay their debts and leave the evidence of them in the hands of their creditors. Nor do they overlook policies of life insurance, worth hundreds or thousands of dollars, when they become entitled to them.

Another matter appears in the pleading of the Pullen heirs which tends to do away with the contention as to the presumption of payment, and to settle, beyond dispute, the existence of the debt. This matter is the plea of payment. A plea of payment admits the debt, and the onus of proof of payment is on the defendants: *Bass v. Shurer*, 2 Heisk. 216.

It appears very evident from the record that the notes held by the bank were for the annual premiums due and accruing on the policy. It has been held that premiums paid on a life insurance policy by an assignee of the same are an equitable lien on the policy, even as against the interest of a minor whose assignment was void because of his minority, and the creditor

who paid the premiums is entitled to collect the same and interest: *Scobey v. Waters*, 10 Lea, 557-563. And, even when an assignment of a life policy is void for the want of an insurable ⁷³⁶ interest in the assignee, or for other reasons, the assignee is, nevertheless, entitled to reimbursement from the proceeds of the policy for money paid by him for the premiums, with interest: 19 Am. & Eng. Ency. of Law, 2d ed., 97.

The third and fourth assignments raise the question of the right of the representatives of the defunct bank's deceased stockholders to sue for and recover this fund. The bank became extinct, as a corporation, March 20, 1888. Its debts were all paid. Its assets belonged to the stockholders. All of them were dead. The right of action on the policy accrued in 1900. The insurance company did not contest its liability, and the amount of the policy has been paid into court.

The question is now, To whom does this amount belong? In *State v. Bank of Tennessee*, 5 Baxt. 107-113, it was held that where Watson, trustee and receiver of the bank, had failed to sue for assets of the bank during the receivership, then creditors of the bank might collect assets not previously collected, and this after the expiration of the date limited by the statute to wind up the corporation, or any extension of such limit under the law.

In *O'Conner v. City of Memphis*, 6 Lea, 732, it is said: "It is now well settled, both in England and in this country, that equity will, upon a dissolution of a corporation by the expiration of ⁷³⁷ its charter or otherwise, impound its property, real and personal, and appropriate it, first, to the payment of its debts, and then for the benefit of the stockholders, and the law is now independent of the statute that upon the civil death of a corporation its real estate does not revert to the original owner; the debts due to and from it are not extinguished, and its personal property does not vest in the state."

Section 5187 of Shannon's compilation provides as follows: "A corporation is not dissolved by nonuse or assignment to others in whole or in part of its powers, franchises, and privileges, unless all the corporate property has been appropriated to the payment of the debts, and any creditor, for himself and any other creditors, whether he has recovered judgment or not, or any stockholder, for himself and other stockholders, may file a bill under the provisions of this chapter to attach the corporate property and have such property applied to the payment

of the debts of the corporation, and any surplus divided among the stockholders."

This section recognizes the rights of stockholders to realize the assets that formerly belonged to the corporation, even though the corporation cannot sue. And this is the rule generally recognized: 9 Am. & Eng. Ency. of Law, 2d ed., 608. And the assets must be prorated and paid out in proportion as the subscriptions of stock have been paid: Cook on Stock and Stockholders, sec. 641.

738 We are of opinion, for the reasons stated, that the representatives of the deceased stockholders are entitled to receive the net proceeds of this policy in full after the payment of all costs which are directed to be paid out of the fund, and inasmuch as their demands, with interest, exceed face amount of the policy, it will be paid pro rata to them in accordance with the interests of their several intestates.

A Creditor may Insure the Life of his debtor: Wheeland v. Atwood, 192 Pa. St. 237, 73 Am. St. Rep. 803, 43 Atl. 946; Ulrich v. Reinoehl, 143 Pa. St. 238, 24 Am. St. Rep. 534, 22 Atl. 862; although the debt is barred by the statute of limitations: Curtiss v. Aetna Life Ins. Co., 90 Cal. 245, 25 Am. St. Rep. 114, 27 Pac. 211; Rawls v. American etc. Ins. Co., 27 N. Y. 282, 84 Am. Dec. 280.

The Assignment of Life Insurance policies is considered at length in the note to Chamberlain v. Butler, 87 Am. St. Rep. 484-519.

CASES
IN THE
SUPREME COURT
OF
UTAH.

NICHOLS v. OREGON SHORT LINE RAILROAD CO.

[24 Utah, 83, 66 Pac. 768.]

RAILROADS—Contract to Furnish Cars.—It is within the power of a railroad company to contract to furnish to a shipper cars belonging to another company. (p. 779.)

RAILROADS—Agent's Contract to Furnish Cars.—A contract by a railroad station agent on behalf of his company to furnish a shipper certain cars belonging to another company is within the apparent scope of his authority and binding on his principal. (p. 780.)

RAILROADS—Agent's Contract to Furnish Cars—Burden of Proof as to Authority.—A contract by a railway station agent on behalf of his company to furnish a shipper cars belonging to another company is presumptively within the scope of his authority, and the burden of proof is upon the railway company to rebut such presumption and show his want of authority. (p. 782.)

RAILROADS—Breach of Contract to Furnish Cars.—If a railway station agent contracts on behalf of his principal to furnish a shipper with a specific kind of cars belonging to another company, the company, on whose behalf the contract is made is not relieved of the duty to furnish cars at the required time by inability to obtain the kind contracted for. In such case the company must, with the consent of the shipper, furnish him with some kind of cars without unreasonable delay, or notify him of its inability to do so, and, for a failure and neglect to perform such duty, it is liable for the damages caused thereby. (p. 782.)

RAILROADS—Contract to Furnish Cars—Discrimination.—If a railroad company contracts to furnish a shipper with cars at a certain time, its action in filling subsequent orders for cars before such shipper is supplied is an unlawful discrimination for which it must respond in damages. (pp. 782, 783.)

P. L. Williams and G. H. Smith, for the appellant.

H. S. Tanner and J. M. Cannon, for the respondent.

⁸⁶ BARTCH, J. The appellant insists that neither its station agent nor the company itself had any power to enter into a contract to furnish cars of another company, and that therefore the company was not liable under the contract in evidence. This position can be of no avail to the company under the evidence in this case. Admitting that it could not furnish cars of another company without such company's consent, there is nothing to show that it could not enter, or had not entered, into some arrangement with other railroad companies to furnish their cars to shippers. On the contrary, the proof indicates that it was a usual thing for the appellant to furnish such cars, and we know of no rule of law which prevents such an arrangement between common carriers. An arrangement whereby one or each one of several common carriers is permitted to ship freight over the lines of the other, and for that ⁸⁷ purpose to procure cars of such other, is entirely in consonance with public convenience and benefit, and hence is not in contravention of public policy. Nor has it been shown in this case to be forbidden by any law or the charter of the company. From the proof it would seem that the power to make such arrangements is necessary to carry out the objects and purposes of the corporation. In 2 Redfield on Railroads, section 180, page 134 et seq., it is said: "The American cases upon this subject, with rare exceptions, recognize the right of a railway company to enter into special contracts to carry goods beyond the line of their own road. And where different roads are united in one continuous route, such an undertaking in regard to merchandise received and booked for any point upon the line of the connected companies is almost matter of course. It is, we think, the more general understanding upon the subject among business men and railways, their agents and servants. And this is so although the connection among such roads is only temporary, and merely incidental for the convenience of transacting business, one road acting sometimes as agent for other roads by their procurement or adoption." And again, in section 181, page 141, it is said: "It has generally been considered, both in this country and in the English courts, that receiving goods destined beyond the terminus of the particular railway, and accepting the freight through, and giving a ticket or check through, does import an undertaking to carry through, and that this contract is binding upon the company." In *Pittsburg etc. Ry. Co. v. Morton*, 61 Ind. 539, 577—a case cited in behalf of the appellant—it was said: "Doubtless a common carrier

may so hold himself out to the public as to make himself liable for not receiving and carrying goods beyond his own line; or by a special contract, he may make himself liable for not receiving and carrying goods beyond his own line; or, if a person not a common carrier in fact, and not holding himself out to the public as a common carrier, undertakes by contract to carry goods to a given point, he will be held liable for a breach of his ^{as} contract as a common carrier." If, then, the appellant had the power, as we think it had, to enter into special contracts or make arrangements with other railway corporations for the transportation of freight over their lines, we may justly assume from the course of dealing by the company and its agents, as shown by the evidence in this case, that some arrangement existed between it and the other corporations over whose lines the sheep were to be transported, including the Chicago and Northwestern Railway Company. Such being the case, the question is, Had James Strachan, the company's agent, authority to enter into the contract in dispute? We think he had. The evidence shows that he was the agent in charge of the station at Soda Springs, and as such represented the corporation, and transacted its business there. The company held him out to the public as its agent to transact such business, within the objects of its creation, as might arise at that station. As to that station, and within the range of the corporate business to be there transacted, he must be regarded as the company's general agent, with the right to exercise such powers as necessarily, properly, and legitimately belong to the character in which his principal held him out. As to the business over which this controversy arose, it is clear from the proof that the company impressed upon the agent the character of one authorized to act and speak for it. The business was such as was within the powers of the corporation to transact, was transacted in the usual way, and therefore it cannot be asserted, as against third persons who have acted in good faith, that such a contract is not within the scope of the agent's power, or that the principal did not intend to confer such power. Where, under such circumstances as are shown herein, a station agent contracts to ship livestock, the shipper has a right to assume that such agent acts within the scope of his authority. Authority to speak and act in such a case follows as a necessary attribute of the character impressed upon the agent by the principal. In 5 American and English Encyclopedia of Law, second edition, ^{so} 351, the law is stated thus: "Where a railroad company places an agent in

charge of its business at a station, and empowers him to contract for the shipment of freight, it holds him out to the public as having the authority to contract with reference to all the necessary and ordinary details of the business, and within the range of such business he becomes a general agent. Every presumption is, therefore, in favor of the authority of a station agent to enter for his company into contracts for transportation, when such contracts are not of an unusual or extraordinary character." In *Wood v. Chicago etc. Ry. Co.*, 68 Iowa, 491, 56 Am. Rep. 861, 27 N. W. 473, in reference to the authority of a station agent it was said: "He was the only representative of the company at that station. He was placed there for the purpose of transacting its business at that place. He was authorized to contract in its name for the transportation of property of the kind in question, and had the authority to receive it for shipment. Shippers had the right to assume, in the absence of information to the contrary, that he had authority from his principal to contract for the doing of whatever was reasonably necessary to be done in the shipment of such property. By placing him in charge of its business at that station, and empowering him to contract for the shipment of such property, it held him out as possessing the authority to contract with reference to all the necessary and ordinary details of the business. Within the range of that business, he was a general agent." So, in *Harrison v. Missouri Pac. Ry. Co.*, 74 Mo. 364, 41 Am. Rep. 318, it was said: "It may, we think, be safely affirmed that a station agent clothed with the power, and whose duty it is, to receive and forward freight, who makes a contract within the scope of his apparent authority, thereby binds the company he represents, although in making such contract he may have exceeded his authority; and when such company seeks to absolve itself from liability arising under such contract on the ground that the agent, although apparently authorized to make it, in fact had no such authority, it ⁹⁰ must show that the party with whom the contract was made had knowledge of the fact that the agent was acting beyond his authority": *Mechem on Agency*, sec. 278; *Pruitt v. Hannibal etc. R. R. Co.*, 62 Mo. 527; *Lake Erie etc. R. R. Co. v. Rosenberg*, 31 Ill. App. 47; *McCarty v. Gulf etc. Ry. Co.*, 79 Tex. 33, 15 S. W. 164; *Baker v. Kansas City R. R. Co.* 91 Mo. 152, 3 S. W. 486; *Deming v. Grand Trunk Ry. Co.*, 48 N. H. 455, 2 Am. Rep. 267; *Chicago etc. R. R. Co. v. Wolcott*, 141 Ind. 267, 50 Am. St. Rep. 320, 39 N. E. 451; *Harrell v. Wilmington etc. Ry. Co.*, 106 N. C. 258, 11 S. E. 286.

Nor was it incumbent upon the plaintiff to allege and prove that the station agent had authority to make the contract for cars. In a case where a common carrier is sued for a breach of such a contract which, as in this instance, is not shown to be of an unusual or extraordinary character, the presumption is that the agent had authority to make it, and the burden of proof is upon such carrier to show that he had not such authority: *Gulf etc. Ry. Co. v. Wright*, 1 Tex. Civ. App. 402, 21 S. W. 80; *Pruitt v. Hannibal etc. R. R. Co.*, 62 Mo. 527.

The mere fact that the agent agreed to furnish a specific kind of cars owned by another railway company did not, under the circumstances shown in evidence, render the contract void, nor relieve the appellant company from its duty to furnish other cars if the specific cars could not be obtained; for it is shown that it was not unusual for the agent to enter into contracts like the one in question. It appears that on the same day of the making of this agreement he made another of exactly the same kind with another person. The agent himself, testifying for the defendant, stated that, if a person ordered a certain kind of car, "it simply showed a preference for that car"; that it was generally understood that, if a shipper could not get the kind of car he wanted, he would take what he could get; and that witness so understood the order of the plaintiff. It also appears in evidence that the plaintiff was willing to take any kind of cars he could get. The ²¹ order, after entry, was transmitted to superior officers of the corporation, without, so far as appears, any objection thereto being made by them. Under these circumstances, the company had no right to permit an unreasonable delay in furnishing cars. If, for any cause, it was unable to furnish them at the time it agreed to do so, then it became its duty to inform the shipper of such fact within reasonable time, if practicable; and if, in the absence of such notice, the shipper believed that the cars would be in readiness at the time named, and, relying upon the conduct of the carrier, presented his livestock at the time and place named, only to find no cars, there would seem to be no good reason why the company should not be held liable for damages, if injury was caused by neglect of such duty: *Ayres v. Chicago etc. Ry. Co.*, 71 Wis. 372, 5 Am. St. Rep. 226, 37 N. W. 432.

Nor had the appellant any right to furnish cars to other persons which, in accordance with the order of the time in which the notice for cars was given, ought to have been furnished to the plaintiff, and thus discriminate against him in favor of other

shippers at the same station. The rights of all shippers of live-stock applying for cars under the same circumstances are necessarily equal. The respondent was entitled to the same consideration respecting his order as any other shipper, and such discrimination as is disclosed by the evidence herein cannot be upheld. The law in such cases permits no unreasonable preference or advantage to or in favor of any person: *Ayres v. Chicago etc. Ry. Co.*, 71 Wis. 372, 5 Am. St. Rep. 226, 37 N. W. 432; *McDuffee v. Portland etc. R. R. Co.*, 52 N. H. 430, 13 Am. Rep. 72; *Ballentine v. North Missouri R. R. Co.*, 40 Mo. 491, 93 Am. Dec. 315.

From the foregoing considerations, we are of the opinion that the court did not err in refusing to instruct the jury, as requested by the defendant, to the effect that the agent had no authority to make the contract in question, and that the same was, therefore, invalid.

⁹² We find no reversible error in the record. The judgment is affirmed, with costs.

Miner, C. J., and Baskin, J., concur.

A *Carrier* is liable for loss sustained by a shipper, by reason of its failure to furnish him with means of transportation for his produce to points beyond its own line, when he has no other means of shipment, and the carrier holds itself out as furnishing, and does furnish, for others, transportation to such points: *Chicago etc. R. R. Co. v. Wolcott*, 141 Ind. 267, 50 Am. St. Rep. 320, 39 N. E. 451. And carriers owe the same duty relatively to all shippers at stations of the same business importance as to supplying cars. No station, much less any shipper, has the right to command the entire resources of the carrier to the exclusion of other stations and shippers: *Ayres v. Chicago etc. Ry. Co.*, 71 Wis. 372, 5 Am. St. Rep. 226, 37 N. W. 432.

JENKINS v. JENSEN.

[24 Utah, 108, 66 Pac. 773.]

LIMITATION OF ACTIONS—Administrator and Minor Heir.—

If an administrator neglects to bring an action to recover property of the estate until it is barred under the statute of limitations, the heir is also barred, though he is a minor at the time the action accrues to the administrator. (p. 791.)

LIMITATION OF ACTIONS—Trustee and Minor Cestui Que

Trust.—Whenever the right of action in a trustee is barred by the statute of limitations, the right of a minor cestui que trust represented by him is also barred. (p. 791.)

LIMITATION OF ACTIONS Against Trust.—The rule that the statute of limitations does not bar a trust estate holds only between the trustee and cestui que trust, and not as between such parties on one side, and strangers on the other. (p. 793.)

LIMITATION OF ACTIONS Against Administrator—Remedy of Minor Heir.—If, through the neglect of an administrator to sue, he and the minor heir are barred by the statute of limitations, the heir may recover against him or his bondsmen. (pp. 792, 793.)

CONTRACTS—Construction.—If the language used by parties to a contract is indefinite and ambiguous, and hence of doubtful construction, the practical construction of the parties themselves is entitled to great, if not controlling, influence. (p. 795.)

LIMITATION OF ACTIONS—Subsequent Disability.—If the statute of limitations once commences, it does not cease to run on account of any subsequent liability, unless such disability comes within the exception of the statute. (p. 795.)

LIMITATION OF ACTION Against Posthumous Heir.—If the right of an administrator to sue is barred by limitation, the right of a posthumous heir represented by him, and born after his appointment is also barred, and his infancy does not stop the running of the statute. (p. 795.)

CONTRACTS OF INFANTS—Repudiation.—A minor cannot repudiate a contract made for his benefit without returning the property in his possession obtained by and through it. (p. 796.)

On July 16, 1875, Thomas Jenkins purchased and thereafter he occupied lots 1, 2, 3 and 16, block 22, ten-acre plat A, hereafter known as the forty-acre tract. Said Jenkins was a Mormon, having a legal wife, Ann Jenkins, by whom he had eight children. He also had a plural wife, Mary R. Jenkins, by whom he had eleven children. J. A. Jenkins, the father of the plaintiff, was his eldest son by his lawful wife. On March 2, 1876, Thomas Jenkins, desiring to provide for the support of his wives and their families in case of his death, conveyed the forty-acre tract, embracing lot 16, to Mary R. Jenkins, and one hundred and twenty-nine acres, owned in another tract, by him to Ann Jenkins. It was then orally agreed that Thomas Jenkins was to manage and occupy the said land during his lifetime, the grantees to take possession at his death. On April 5, 1877, the parties agreed to exchange the respective tracts of land. Ann conveyed her tract to Mary R., who, at the request of Ann, conveyed her tract to Ann's son, J. A. Jenkins, who took without consideration, but subject to the former agreement of the parties as to the life tenancy of T. R. Jenkins, and a further agreement that after the death of his father he was to support his mother during her life and his sisters during their minority, or until they should marry, and also support one Mary Bundy.

J. A. Jenkins always lived at home with his father, and on September 25, 1879, died intestate without issue, though mar-

ried, and on December 8, 1879, his widow gave birth to his son, J. A. Jenkins, Jr., the plaintiff in this action. J. A. Jenkins, deceased, never took possession of the forty-acre tract which always remained in the possession of T. Jenkins and his successors up to the time of this trial. On November 3, 1879, J. S. Barnes was appointed, and has continued to act as administrator of the estate of J. A. Jenkins, and on September 27, 1880, began suit against T. Jenkins for the possession of the forty-acre tract and damages, together with rents and profits thereof. T. Jenkins answered, setting up the facts heretofore mentioned, but it does not appear that this suit or others begun about the same time between the parties were ever prosecuted to judgment. On October 13, 1880, Minnie R. Jenkins was appointed guardian for her son, J. A. Jenkins, Jr., and has ever since continued to act as such. On November 26, 1880, the parties entered into an agreement substantially as follows: "1. That the title to the said forty-acre tract, herein described as lots 1, 2, 3, and 13, and the water belonging to the same, is and shall remain in the estate of said John A. Jenkins, deceased, and shall descend to his heirs, with the following limitations, restrictions, and conditions, to wit: That in consideration of the sum of three hundred dollars per annum, to be paid by Thomas Jenkins quarterly, he shall have the use of said tract during his lifetime, or until the coming of age or marriage sooner, of said John A. Jenkins, Jr., when said possession shall cease. That said sum of three hundred dollars shall be equally divided between Ann Jenkins, Mary Bundy, John A. Jenkins, Jr., Anna Jenkins, and Alice Jenkins, and the survivor of them; provided, that the shares of Alice and Anna Jenkins shall cease and pass to the other beneficiaries upon their arrival at the age of twenty-five years, or marriage sooner. That upon the arrival of said John A. Jenkins, Jr., at the age of twenty-one years, the title to said tract of land shall vest in him and his heirs forever. Should said John A. Jenkins, Jr., die during minority, leaving no issue, full title to said land shall pass to said Minnie R. Jenkins and the heirs of her body forever, subject to the use thereof by Thomas Jenkins for the time and on the terms and conditions aforesaid. That should said Minnie R. Jenkins die without lineal descendants, said land shall revert to said Thomas and Ann Jenkins and their heirs. That should Ann Jenkins be living when John A. Jenkins becomes of age, she shall receive during her lifetime one-half the net proceeds of said land. 2. The estate of John A. Jenkins waives all claims to articles and items named and described in

said action No. 4544, and agrees to accept and receive in lieu thereof the sum of two hundred dollars, to be paid by said Thomas Jenkins. The estate also waived all claims for rents and damages arising in case No. 4542 in the district court. Thomas Jenkins waives all claims and demands set up in action No. 4557, and accepts in lieu thereof a credit of five hundred dollars on his note for fifteen hundred dollars held by said estate, and the surrender to him of a note of John S. Hintz held by said estate. That all of said suits shall be dismissed on approval by the probate court of this agreement, the performance of the conditions herein specified, and the entering into agreement for the performance of the further conditions." This agreement was signed by T. Jenkins, Ann Jenkins, Minnie R. Jenkins, J. S. Barnes, administrator, and the sisters of J. A. Jenkins, deceased.

This agreement was confirmed by the probate court in January, 1881, and the parties were ordered to enter into an agreement for the performance of the further conditions. This they failed to do, nor did they perform the conditions of the original agreement.

Finally, on September 1, 1881, Minnie R. Jenkins, in person and as guardian of the plaintiff, and John S. Barnes, as administrator of the estate of John A. Jenkins, deceased, as parties of the first part, for a valuable consideration, made and delivered to Ann Jenkins and Thomas Jenkins, as second parties, an agreement or deed reciting, in substance, the facts hereinbefore stated, and also the fact that Ann Jenkins claimed the forty-acre tract; that litigation and disputes existed; that John A. Jenkins held title to the forty-acre tract as trustee until certain conditions were performed; that the agreement made by parties in November, 1880, with a view to settling the difficulties, and whereby the income of the land, amounting to three hundred dollars per year, was to be equally divided between John A. Jenkins, Jr., Anna and Alice Jenkins, Ann Jenkins, and Mary Bundy, was not approved by the probate court as a condition precedent to the ratification of the same; that the parties disagreed as to its meaning and terms; and that the same was never wholly adopted by the parties thereto. Thereafter it was stipulated and agreed therein that: "This said agreement is upon the condition that whatever rights Anna, Alice, Ann Jenkins, and Mary Bundy have in the agreement of November 26, 1880, are hereby made a charge upon the one-half of said forty-acre tract hereby in this agreement conveyed; that no lia-

bility shall exist, arise, or remain on said agreement against the parties of the first part, or the estate of John A. Jenkins, deceased, or either of them, or upon the twenty acres conveyed to them, for any part of said three hundred dollars, or any support for said Anna, Alice, and Ann Jenkins or Mary Bundy; that in consideration of the premises, and of the advice and approval of counsel on both sides, and for the purpose of settling litigation, it is hereby agreed to cancel and make void said agreement of 1880, and to settle said controversy by dividing said land, giving one-half to Ann Jenkins, and the other half to John A. Jenkins and his mother, Minnie R. Jenkins, they to take in the same proportion as they would inherit from the said husband and father under the law, and, for a further consideration to induce said settlement, the said second parties agree to give to the estate of John A. Jenkins five hundred dollars. Therefore, in consideration of the premises, and of the full and complete relinquishment of the said parties of the second part of the whole of said lots 2 and 3, and for the sum of five hundred dollars to the said estate of deceased, John A. Jenkins, in hand paid, and for the full relinquishment of the water rights belonging thereto, and for other good and valuable consideration, have granted, bargained, and sold, and by these presents do grant, bargain and sell, and convey, unto the said Ann Jenkins, on condition of all charge under said agreement or otherwise for the support of said Alice, Anna, and Ann Jenkins and Mary Bundy, as heretofore stated, and for their share of the three hundred dollars being released from the land conveyed to parties of the first part; and the parties of the second part, by accepting this deed or agreement, do covenant that they will protect and save harmless the said parties of the first part against any claim of Alice, Anna, and Ann Jenkins and Mary Bundy upon said twenty acres conveyed to the parties of the first part, or the income thereof, and do charge said claim of the persons last named upon the twenty acres hereby conveyed (said lots 1 and 16) with and including all the estate, right, title, and interest and claim of the said minor John A. Jenkins, and the said Minnie R. Jenkins, or the said administrator, of, in, and to said lots so granted, or intended to be, with the appurtenances thereto belonging. To have and to hold the said granted and conveyed premises unto the said Ann Jenkins and her heirs and assigns forever; and the said parties of the first part hereby covenant to warrant and defend the title of said parties of the second part against any claim, right, or interest of John A. Jenkins, Jr., his heirs or

assigns, to the said twenty acres hereby conveyed [which embraced lots 1 and 16]." This latter agreement was made to settle the existing disputes and difficulties between the parties, and its provisions have been duly performed by all of them until the commencement of this action. In 1882, Thomas and Ann Jenkins having always held, and while still in possession of lots 1 and 16, conveyed the same to one Roberts, who, after holding possession until 1896, conveyed them to Mary E. Jensen, who is now in possession, and who in 1900 mortgaged the premises to the defendant Quayle. Other facts appear from the opinion.

Pierce, Critchlow & Banette, for the appellant.

Bennett, Howatt, Sutherland & Van Cott and G. L. Nye, for the respondents.

¹²⁰ MINER, C. J. The appellant contends that the title to lots 1 and 16 became absolutely vested in him by virtue of the agreement of November 26, 1880, and that he was entitled to the possession thereof on December 8, 1900—that being the date he arrived at the age of twenty-one years—and that neither the administrator nor guardian obtained any authority to enter into the second agreement. The respondents claim: 1. That appellant's cause of action was barred by the statute of limitations of this state long before the institution of this action; 2. That plaintiff is barred by reason of the compromise made in 1881, by ¹²¹ which Thomas and Ann Jenkins gave up claim to lots 2 and 3, and the administrator and guardian thereafter gave up all claim to lots 1 and 16; 3. The compromise of 1881 was affirmed by the appellant and his representatives by retaining possession of lots 2 and 3, and asserting title thereto, without any offer to return the same; 4. Plaintiff is estopped from claiming the property.

A careful examination of the statement of facts heretofore presented, and the findings of the trial court thereon, will show that John A. Jenkins, deceased, never entered into possession of the forty-acre tract after obtaining the deed from Mary R. Jenkins, nor did he ever claim to own the property, but, on the contrary, asserted that it was not his property; that he held it for his mother and sisters. The administrator never had possession of the forty-acre tract, including lots 1 and 16. The agreement of 1881 tends to show that the administrator and the guardian (the mother of the plaintiff), in conveying away lots 1 and 16, knew that the same were being held and claimed ad-

versely to them by other claimants. These lots are not mentioned as belonging to the estate in the inventory of the property by the administrator in his petition for sale and distribution of the same as required by the Compiled Laws of Utah of 1876 (page 310, section 145). The testimony and findings show that Thomas Jenkins and his successors and grantees have had the exclusive possession of said land since 1875, and since 1881 have had the exclusive, continuous, adverse, notorious, and peaceable possession of said tract, up to the time this action was commenced, and during that time have paid all the taxes thereon, cultivated the same each year, and inclosed the same with a fence. Under the statutes of Utah in force in and since 1881, the administrator had the exclusive right to the possession of real property belonging to the estate until the final order of the court, and had the right to bring suit to recover any real property belonging to the estate held adversely by others. By the Laws of 1884 possession ¹²² of the heir is made subject to the possession of the administrator for the purpose of administration: Comp. Laws 1876, p. 301, sec. 107; Comp. Laws, p. 319, sec. 183; Comp. Laws, p. 320, sec. 184; Laws 1884, p. 404, sec. 10; Laws 1884, p. 429, sec. 2; 2 Comp. Laws 1888, p. 486, sec. 10; Comp. Laws, p. 489, secs. 1-3; Rev. Stats. 1898, secs. 3912-3914; Comp. Laws 1876, p. 402, sec. 6; Laws 1884, p. 192, sec. 226; Rev. Stats. 1898, sec. 2902; Comp. Laws 1888, sec. 3171.

The principal question for consideration, therefore, is whether the statute of limitations could have run against the plaintiff when he became of age, on December 8, 1900. In the consideration of this question, it must be remembered that this is not an action between the administrator and guardian, on the one side, and one claiming as heir, on the other, but is an action between one claiming as heir to an estate on the one hand, and strangers to the estate on the other. By the provisions of section 107, page 301, of the Compiled Laws of 1876 the administrator has the right to the possession of all real estate until the estate be settled, or is otherwise dispossessed by order of the court. By section 183, page 319, of the Compiled Laws of 1876, the administrator is required to take possession of all real estate of the deceased. For the purpose of bringing suits to quiet title the possession of the administrator is deemed the possession of the heir. Possession of the heir is made subject to the possession of the administrator for the purpose of administration: Laws 1884, p. 404, sec. 10; Laws 1884, p. 429, sec. 1. Section

179, page 319 of the Compiled Laws of 1876 reads as follows: "No action for the recovery of any estate sold by an executor or administrator under the provisions of this act shall be maintained by any heir or other person claiming under the deceased testator or intestate, unless it be commenced within two years next after the sale." Section 180: "The preceding section shall not apply to minors or others under any legal disability to sue at the time when the right of action shall first accrue; but all such persons may ¹²³ commence such action at any time within two years after the removal of the disability." Section 13, page 365 of the Compiled Laws of 1876 provides as follows: "If a person entitled to commence any action for the recovery of real property, or for the recovery of the possession thereof, or to make any entry or defense founded on the title to real property, or to rents or services out of the same, be at the time such title shall first descend or accrue, either, first, within age of majority, or second, insane. . . . The time during which such disability shall continue shall not be deemed any portion of the time in this act limited for the commencement of such actions, or the making of such entry or defense, but such action may be commenced or entry or defense made within the period of two years after such disability shall cease, or after the death of the person entitled, who shall die under such disability, but such action shall not be commenced or entry or defense made after that period."

In the case of *McLeran v. Benton*, 73 Cal. 329, 2 Am. St. Rep. 814, 14 Pac. 879, a similar question, under a like statute in California, was determined. The question was raised whether the plaintiffs, infants, were barred on account of the executor being barred; and the court held that the statute of limitations had run against the infants, notwithstanding their infancy, because the executor representing them was barred. The court said: "If the entry of the defendants was wrongful, the devisees of Harmon could not maintain an action, for that right existed exclusively in the executors, who, in all suits for the benefit of the estate, represented both the creditors and the heirs: *Cunningham v. Ashley*, 45 Cal. 493; *Halleck v. Mixer*, 16 Cal. 579. It would seem to follow, therefore, that when the executor is barred of his action the heir is barred, although the heir or devisee be laboring under a disability: *Wilmerding v. Russ*, 33 Conn. 68. The general rule is that when a trustee is barred by the statute of limitations the cestui que trust is likewise barred, even though an ¹²⁴ infant (*Hill on Trustees*, 267, 403, 504),

and that the heir or devisee is dependent upon the diligence of the executor for the maintenance of his rights with respect to the real property, but is not without a remedy by an action for damages against his executor and his sureties, or by a proper proceeding to compel him to bring suit: *Tyler v. Houghton*, 25 Cal. 29. This subject has been very carefully considered, and the decisions and statutes of this state elaborately reviewed, by the circuit court and the supreme court of the United States, and the conclusion reached that, where the administrator in this state neglects to bring an action to recover property of the estate until it is barred under the statute of limitations applicable to the subject, the heir is also barred, even though the heir be a minor at the time the action accrues to the administrator: *Meeks v. Vassault*, 3 Saw. 206, Fed. Cas. No. 9393; *Meeks v. Olpherts*, 100 U. S. 564." In the case of *Meeks v. Olpherts*, 100 U. S. 564, suit was brought to recover decedent's property sold by the executor, on the ground that the sale was void, and the question of the statute of limitations was raised, as affecting the right of the infant to sue under a statute like that of Utah. In its opinion the court calls attention to the fact that the administrator had the right to the possession of all the property, and was the only person and the proper party to bring the action to recover the real estate, and that, as more than three years had elapsed without suit being brought by the administrator, the cestui que trust, although a minor, was barred, because the right to commence the suit was in the administrator, and if he did not sue within the required time all persons under him were barred. The court said: "The right of action on the title which the plaintiff now asserts was in the administrator, and the statute, therefore, ran against him and against all whose rights he represented. 'In all suits for the benefit of the estate he represents both the creditors and the heirs,' said the supreme court in *Beckett v. Selover*, 7 Cal. 215, 68 Am. Dec. 237. Whatever ¹²⁵ doubt may have existed at one time on the subject, there remains none at the present day, that whenever the right of action in the trustees is barred by the statute of limitations the right of the cestui que trust thus represented is also barred. This doctrine is clearly stated in *Hill on Trustees*, 267, 403, 504, and the authorities there cited fully sustain the text, both English and American." In a note to *Moore v. Armstrong*, 36 Am. Dec. 68, where many authorities are cited to support the text, it is said: "There is also a diversity of opinion on the question as to how far the rights of an infant are affected when his property

is in the hands of a trustee, executor, or guardian; and the tendency of the decisions is to support the position that when the right of action vests in an executor, guardian, or trustee, who is under no legal disability, the statute will commence to run despite the disability of the minor, and, if the claim is lost by the neglect of the representative to sue, the minor is barred."

From the above authorities it is apparent that where the executor, administrator, or trustee has a right to sue, and omits that duty, the beneficiary is then barred, and his remedy is against the administrator or his bondsmen. In *Patchett v. Pacific Coast Ry. Co.*, 100 Cal. 505, 35 Pac. 73, the court laid down the same rule announced in *Moore v. Armstrong*, 36 Am. Dec. 68. In the opinion in that case it is said: "The rule that the statute of limitations does not bar a trust estate holds only between cestui que trust and trustee, not as between cestui que trust and trustee on one side, and strangers on the other; for that would make the statute of no force at all, because there is hardly any estate of consequence without such trust, and so the act would never take place. Therefore, where the cestui que trust and his trustee are both out of possession for the time limited, the party in possession has a good bar against them both. . . . Where the trustee is barred, so is the cestui": 13 Am. & Eng. Ency. of Law, 740. In *Dennis v. Bint*, 122 Cal. 40, 68 Am. St. Rep. 17, 54 Pac. 378, the question ¹²⁶ was presented whether the heirs were barred because the administrator was barred, and the court said: "The result of the cases involving or illustrating the effect of these sections, in their original form, is that, if the administrator failed to sue to recover the land or set aside the sale within three years next following the sale—the administration so long continuing—then the heirs as well as himself were barred, even though the heirs were minors; this on the ground that under our system the administrator represents the heirs; he, the trustee; they, the cestuis." In this decision the administrator is held to be the trustee, and the heirs the cestuis; and this under statutes like those of Utah.

In 27 American and English Encyclopedia of Law, first edition, 98, 100, the general rule is laid down that the statute of limitations runs as between the administrator and the heirs, on the one side, and strangers, on the other, although ordinarily the statute does not run between the trustee or administrator, on the one side, and the beneficiary, on the other. In the present case, the administrator had the exclusive right of possession, with a right to sue, which, for the purposes of administration, gave

him the legal title until divested by distribution or by order of the court. The estate in question is still in the hands of the administrator, and he has never taken possession of the property in dispute, but the same has remained in the peaceable possession of Thomas Jenkins and his grantees since 1875, without interference on the part of the administrator since the agreement of 1881. John A. Jenkins never took possession of the lots in question under his deed, and claimed no ownership therein, except as trustee for his mother and sisters. Ann Jenkins and Thomas Jenkins continued in possession of the forty-acre tract on September 1, 1881, when the last agreement was made between the parties, and previous to that date, from 1875, continued in possession of said lots 1 and 16 under claim of title founded on said agreement of September 1, 1881, exclusive of any other right whatever, and so continued until they conveyed them in 1882 ¹²⁷ to the grantors of the defendants herein, who have held possession thereof since 1896, being a continuous, undisputed, peaceable possession in them and their grantees for more than eighteen years previous to the time of the commencement of this suit, during all of which time the administrator has not only failed to take proceedings to recover possession, but has personally and officially assented to the ownership and possession thereof by the defendants and their grantors since the time of his appointment, in 1879, knowing at that time and since that Thomas and Ann Jenkins and their grantees were in possession claiming title to the land. Irrespective of other considerations presented in the record, we are of the opinion that, under the facts disclosed, the right of possession being in the administrator, the rule that the statute of limitations does not bar a trust estate holds only between the cestui que trust and trustee, and not as between the cestui que trust and trustee, on the one side, and strangers, on the other. The defendants in this action were strangers to the estate, and they and their predecessors in interest and grantors having held lots 1 and 16 adversely, under a claim of title, and under the requirements of the statute, for more than seven years, their title must be held quieted and freed from the assumed ownership and claim of the plaintiff: Utah Comp. Laws 1876, pp. 363, 364, secs. 4-6; Utah Comp. Laws 1876, p. 365, sec. 13; Laws 1884, pp. 184-186, secs. 179, 180, 182, 183, 188; 2 Comp. Laws 1888, secs. 3133-3134, 3140. Under the circumstances disclosed, if an administrator or trustee allows the statute of limitations to run so as to bar his rights as such, he lays himself liable to the heir or anyone else in-

jured by his failure to perform his duty: *Meeks v. Olpherts*, 100 U. S. 564; *McLeran v. Benton*, 73 Cal. 329, 343, 2 Am. St. Rep. 814, 14 Pac. 879.

The appellant claims that the legal title to the lots in question was vested in him by virtue of the agreement of 1880. The court found, and the facts show, that the agreement was ¹²⁸ made to settle the disputes existing between the parties, but that the ill-feeling and animosities continued to exist unabated until the agreement of 1881 was made, when the disputes ceased, and the agreement was accepted by the parties until this suit was brought. By the agreement of 1880 the parties were to enter into an agreement for the due performance of the further conditions named therein, but no agreement for due performance of such further conditions named was ever entered into, and the disputes still continued until the agreement of 1881 was made. It was therein stated that owing to the nonapproval of the probate court, and the misunderstanding of the parties as to the meaning of the paper made in 1880, it was never wholly adopted by the parties thereto. The agreement of 1880 was made to settle the controversy existing between the administrator on the one side, and Thomas and Ann Jenkins on the other, and not between the minor and administrator as to any controversy between them, and it should be construed so as to carry out the objects of the parties. If the legal title to the lots at that time was in the estate of John A. Jenkins, deceased, it descended to the heirs, subject to the right of administration and the payment of the debts of the deceased. It would be a fraud on the creditors and upon the rights of the mother to agree to convey the title to the minor irrespective of their rights. Notwithstanding such agreement of 1880, creditors would still have the right to have the property sold to pay the debts. The administrator reported to the court that the agreement of 1880 was not wholly adopted. The disputes kept up until the 1881 agreement was made. Ann and Thomas Jenkins still remained in possession of the premises until after the agreement of 1881, so that it is probable that the intention of the parties in executing the agreement of 1880 was to settle the rights of the parties as to the ownership, and not to change the character of the ownership from that of heir to that of grantee. They all agreed that the legal title was in the name of John A. Jenkins at the time of ¹²⁹ his death. If this was so, then Thomas and Ann Jenkins had no title they could convey to the plaintiff. In his inventory to the court in 1887 the administrator left out lots 1

and 16, and did not claim them as belonging to the estate, and in his petition for the distribution of the real estate these lots were left out of the schedule. In the guardianship papers of the plaintiff the guardian, who is the mother of the plaintiff, claimed she was entitled to one-third of the income of the farm in accordance with the agreement in 1881, which claim was inconsistent with the agreement of 1880. Since 1881 the administrator and guardian have acted under the agreement of 1881, and have practically ignored that of 1880. In cases where the language used by the parties to a contract is indefinite and ambiguous, and hence of doubtful construction, the practical construction of the parties themselves is entitled to great, if not controlling, influence: *Chicago v. Sheldon*, 9 Wall. 54. It will be remembered that Barnes was appointed administrator in 1879. At this time Thomas and Ann Jenkins were holding possession of the land adversely, and the statute of limitations commenced to run. When the agreement of 1880 was made, these parties were in possession. The actual change in the situation did not occur until 1881. The statute was therefore running before the agreement of 1880, and continued to run after that agreement was executed, so that the disability of the plaintiff, even if he could take title by the agreement of 1880, did not stop the running of the statute. The law is well settled that, when the statute of limitations once commences to run, it does not cease to run on account of any subsequent disability, unless such disability comes within the exception of the statute: 13 Am. & Eng. Ency. of Law, 1st ed., 731, 732. The administrator or trustee having the right to commence suit for the recovery of the property within the time limited by the statute, and having omitted to do so, he ^{is} barred from commencing such action against the respondents, who are strangers to the estate; and his beneficiary is also barred, and his only remedy, if any, would be against the administrator and his sureties. Whether such liability now exists we do not decide.

The respondents also claim that the appellant is barred by reason of the compromise as evidenced by the agreement of 1881, by which Thomas and Ann Jenkins gave up all claim to lots 2 and 3, and the administrator and guardian gave up to them all claim to lots 1 and 16, and that by retaining possession of lots 2 and 3 under such agreement and compromise, and asserting title thereto, he must be held as confirming the compromise; that he cannot repudiate a contract made for his benefit, without returning the property in his possession obtained by and through

it. Inasmuch as this case has been determined upon other grounds, we forbear further discussion upon this subject.

The decree of the district court is affirmed, with costs.

Baskin and Bartch, JJ., concur.

When the Statute of Limitations has run against a trustee, the cestui que trust is also barred: Bryan v. Weems, 29 Ala. 423, 65 Am. Dec. 407; monographic note to Miles v. Thorne, 99 Am. Dec. 398; Trammel & Co. v. Mount, 68 Tex. 210, 2 Am. St. Rep. 479, 4 S. W. 377. And when an executor's or administrator's right to recover property of the estate is barred by the statute, the heir or devisee is also barred, though an infant when the action accrued to the representative: McLERAN v. Benton, 73 Cal. 329, 2 Am. St. Rep. 814, 14 Pac. 879.

OPENSHAW v. HALFIN.

[24 Utah, 426, 68 Pac. 138.]

CONSTITUTIONAL LAW—Failure to Release Mortgage.—

A statutory provision that if a mortgagee fails to release a mortgage after the satisfaction thereof, the mortgagor may, by action, compel such release and recover costs, including a reasonable attorney's fee from such mortgagee, is special legislation, and violates a constitutional provision that no special law shall be enacted when a general law can be made applicable. (pp. 797, 798.)

Rawlins, Thurman, Hurd & Wedgwood, for the appellant.

Pierce, Critchlow & Barrette, for the respondent.

429 BASKIN, J. This is an action to enforce the cancellation by defendant of a mortgage which he held upon certain real estate of the plaintiff. The complaint alleges that the plaintiff at various times before the institution of the action tendered to the defendant the amount due on the note which the mortgage was given to secure, and requested the defendant to release said mortgage, and that the defendant refused, and still continues to refuse, to accept said tender and cancel the mortgage. The answer denied the tender alleged in the complaint, and alleged that "said plaintiff ought not to recover any attorney's fees, because that part of section 2006 of the Revised Statutes of 1898 providing for an attorney's fee is unconstitutional and void, because it denies to the defendant the equal protection of the law, in that it gives the plaintiff an attorney's fee if he obtains judgment, but it does not make the same provision

for the defendant if he secures judgment against the plaintiff, and that the defendant has always been ready and willing to accept the amount due on said note and mortgage, and release said mortgage, and offered to do so before filing his answer. Wherefore he prays that plaintiff take nothing." The trial court found that the alleged tender and requests for the release were made, and that the defendant refused to cancel or discharge the mortgage. It further appears from the findings of the trial court that after the institution of the suit the defendant accepted the amount tendered by the plaintiff, and on the day of the trial canceled the mortgage; that the amount tendered was paid and received with the express and distinct understanding that the action should be continued for the purpose of determining the amount of costs and the damages and attorney's ⁴³⁰ fees claimed by the plaintiff. On the trial the court held that the plaintiff was not entitled to anything on account of attorney's fees, and in the decree entered did not embrace any such fees. The appellant assigns as error the action of the court in refusing a recovery for a reasonable attorney's fee. The parties stipulated that, if it should be held that the plaintiff was entitled to recover attorney's fees, seventy-five dollars would be a reasonable sum for that purpose. No other question is raised in the case.

Section 2006 of the Revised Statutes of 1898 reads as follows: "If the mortgagee fail to discharge or release any mortgage after the same has been fully satisfied, he shall be liable to the mortgagor for double the damages resulting from such failure. Or the mortgagor may bring an action against the mortgagee to compel the discharge or release of the mortgage, after the same has been satisfied. And the judgment of the court must be, that the mortgagee discharge or release the mortgage and pay the mortgagor the costs of suit, including a reasonable attorney's fee, and all damages resulting from such failure." The question here involved is the same as that decided by us in the case of *Brubaker v. Bennett*, 19 Utah, 401, 57 Pac. 170, and that case is decisive of this. The principle involved is fully supported in *Gulf etc. Ry. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. Rep. 255; *Wilder v. Chicago etc. Ry. Co.*, 70 Mich. 382, 38 N. W. 289; *Grand Rapids etc. Chair Co. v. Runnels*, 77 Mich. 104, 43 N. W. 1006; *Coal Co. v. Rosser*, 53 Ohio St. 12, 23, 53 Am. St. Rep. 622, 41 N. E. 263. In the latter case, the principle is aptly stated as follows: "Upon what principle can a rule of law rest which permits one party or class of people to invoke the action of our tribunals of justice at will, while the other

party or another class of citizens does so at the peril of being mulct in an attorney's fee if an honest, but unsuccessful, defense should be imposed? A statute that imposes this restriction upon one citizen or class of citizens, only, denies to him or ⁴³¹ them the equal protection of the law. It is true that no provision of the constitution of 1851 declares in express and direct terms that this may not be done, but nevertheless it violates the fundamental principles upon which our government rests, as they are enunciated and declared by that instrument in the bill of rights. The first section of the constitution declares that the right to acquire, possess, and protect property is inalienable; and the next section declares, among other things, that 'government is instituted for the equal protection and benefit' of every person." In the declaration of rights in our constitution (article 1, section 2) it is declared that "all political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit." Article 6, section 26, subdivision 18, provides that "in all cases where a general law can be applicable, no special law shall be enacted."

The decree is affirmed, with costs.

Miner, C. J., and Bartch, J., concur.

The Constitutionality of Statutes allowing attorneys' fees to certain classes of litigants is considered in the monographic note to Dell v. Marvin, 79 Am. St. Rep. 178-186.

DOWNEY v. GEMINI MINING COMPANY.

[24 Utah, 431, 68 Pac. 414.]

MASTER AND SERVANT—Condition of Premises.—An instruction that it is the duty of the master to keep the premises about which the servant is employed in as reasonably safe condition as they would have been kept by a person of ordinary prudence under the same circumstances, considering the nature of the work to be accomplished, presents a correct proposition of law, without limiting the jury to a consideration of the condition of the premises at the very place where the accident happened to the servant and the injury was received, especially when the inquiry has not been to any other part of the premises. (p. 801.)

TRIAL.—Instructions need not be given when there is no evidence upon which to base them. (p. 801.)

MASTER AND SERVANT—Condition of Premises.—An instruction that it is the duty of the master to keep the premises about which the servant is employed in as reasonably safe condition as they would be kept by a person of ordinary prudence under the same circumstances, considering the nature of the work to be performed, states a correct proposition of law, without the addition of the words "skilled in the business" after the words "person of ordinary prudence." (p. 802.)

MASTER AND SERVANT.—Ordinary Care as between master and servant simply implies and includes the exercise of such reasonable diligence, care, skill, watchfulness, and forethought as, under all of the circumstances of the particular service, a careful, prudent man or officer of a corporation would exercise under the same or similar circumstances. By the term "similar circumstances" is meant to include all the circumstances of time, place and attendant conditions. (p. 803.)

MASTER AND SERVANT.—If a Master Creates a Dangerous Place on his premises unknown to the servant, and fails to warn him thereof, the servant, who is injured by venturing into such dangerous place while in the exercise of ordinary care, is not guilty of contributory negligence. (p. 804.)

NEGLIGENCE—Contributory.—It is not contributory negligence not to look out for danger when there is no reason to apprehend any. (p. 804.)

EVIDENCE—Presumption of Ordinary Care.—It is presumed that all men will, under ordinary circumstances, act with due care, but this presumption is not indulged if circumstances arise such as should convince a reasonable man that such care was not being exercised. (p. 804.)

MASTER AND SERVANT—Negligence—Risk Assumed.—If the danger causing the accident is a peril incident to the employment, and the injury is not caused by a want of ordinary care on the part of the master, then it is a risk assumed by the servant, and he cannot recover, but if the contrary state of facts is true, he is entitled to recover if he is injured without fault on his part. (p. 805.)

NEGLIGENCE, Failure to Define.—In an action to recover for personal injury to a servant, a failure to specifically define negligence in an instruction is not error when the instructions as a whole must have conveyed to the jury the meaning of the term. (p. 805.)

NEGLIGENCE is Failure to Observe, for the protection of another's interests and safety, such care, precaution, and vigilance as the circumstances justly demand, and the want of which causes him injury. (p. 805.)

MASTER AND SERVANT.—Presumption of Negligence on the part of the master does not arise from the mere happening of an accident to his servant. Negligence is not presumed, but is an affirmative fact, which must be proved by a preponderance of the evidence. (p. 806.)

MASTER AND SERVANT—Duty as to Condition of Premises.—A servant in his employment has a right to assume that the master will conduct his business as respects the servant's safety with ordinary prudence and care, and that if he makes the place where he is employed or is required to pass to his work dangerous and unsafe, which was before reasonably safe, and the servant has no knowledge or duty to know of the changed conditions, that the

master will warn him of such danger in time to prevent his injury. Failing in this, the master must respond in damages to the servant injured while exercising due care. (pp. 806, 807.)

MASTER AND SERVANT—Fellow-servants.—An ordinary day laborer in a mine and the foreman thereof are not fellow-servants. (p. 807.)

Rawlins, Thurman, Hurd & Wedgwood, Brown & Henderson, and Bennett, Sutherland, Van Cott & Allison, for the appellant.

Powers, Straup & Lippman, for the respondent.

434 MINER, C. J. The plaintiff was an experienced miner in the employ of the defendant company in July, 1900, and gave testimony tending to show that at the time in question he was working on the fifteen hundred and fifty-foot level. The only way for him to reach and return from the place of his employment was by climbing and descending a seven-foot ladder, the foot of which rested upon planks placed upon timbers, and the top thereof resting against the side of the wall. At the time of the injury complained of the plaintiff ascended this ladder as usual at 1 o'clock P. M. At this time the planks or platform at the foot of the ladder were all in place and nailed down, as had been the case for about one month. After plaintiff had ascended the ladder to his work in the stope above, the foreman of the mine, without plaintiff's knowledge, took up the plank flooring at the foot of the ladder, and left a hole in the platform. Beneath this hole and platform was a chute forty feet in depth. No warning was given to the plaintiff of this change in the platform or floor under the ladder, and no lights or guards were placed there to warn the workmen of the change and danger in descending the ladder. **435** On his return from work plaintiff was required to descend this ladder, and was in ignorance of the changed condition of the platform below. He quit work as usual and descended the ladder with his tools in his arms, exercising, so far as appears, due care. The place where the ladder stood was dark. As he stepped from the last rung of the ladder to a point below, where he had been accustomed to step to the platform, he dropped into and through the chute mentioned, which was partially covered by the platform, about forty feet, and received serious and permanent injuries, for which he seeks to recover damages. The jury found for the plaintiff, and the defendant appealed.

Full instructions were given to the jury upon the issues involved, among others being the following, to which defendant

excepted: "You are instructed that it was the duty of the defendant company to keep the premises about which the plaintiff was employed in a reasonably safe condition; that is to say, in such a condition as the premises would have been kept by a person of ordinary prudence under the same circumstances, considering the nature of the work to be accomplished." It is insisted that this instruction does not limit the jury to a consideration of the condition of the means of ingress and egress to the place of employment in the mine, as charged in the complaint. The proceedings show that the only inquiry concerning the defective condition of the mine was with reference to its condition down and at the foot of the ladder and the platform through a hole in which plaintiff fell. The condition of the platform and ladder were sufficiently and specifically referred to by the court in the statement of the case and charge to the jury, and the inquiry was directed to that condition and to no other part of the mine except where the injury is alleged to have occurred. The law was properly presented in this and other instructions given in connection therewith on that subject.

It is also insisted that the court erred in refusing to give ⁴³⁶ the following request: "Defendant is not obliged to make every place where plaintiff might elect to go reasonably safe, nor was it obliged to anticipate that he would leave his place of work by any other than the usual way, or that he intended to put his tools in any particular place, and therefore, if you find that plaintiff, upon reaching the foot of the ladder, started to go in any other or different direction from that usually traveled by workmen leaving that portion of the stope from which plaintiff was returning at the time of the accident, then, in that case, he must be held to have assumed the risk and all dangers incident to such acts, and cannot recover in this action, and your verdict must, therefore, be for the defendant." If any evidence was given in the case upon which this request could be predicated, it would have been proper, provided the court did not otherwise cover the question in its charge to the jury. This is so because each party is entitled to have instructions given based upon his theory of the case, if there is any evidence to support it: *Buckley v. Silverberg*, 113 Cal. 673, 45 Pac. 804; *Last Chance Milling Co. v. Ames*, 23 Colo. 167, 47 Pac. 382. But counsel have failed to point out any evidence upon which this request to charge could be based, and we are unable to discover any such testimony in the record. The

plaintiff descended the ladder with his face to it, and when he stepped off from the last rung he fell into the hole left in the platform by the foreman. It does not appear that he started to go anywhere else than down the ladder. He took but one step from the ladder, and that step let him into the hole left by the foreman in removing part of the platform. We find no merit in this exception.

It is also claimed that the language used in the instruction given to the effect that it was the duty of the defendant to keep the premises about which the plaintiff was employed in a reasonably safe condition—that is to say, in such a condition as the premises would have been kept by a person of ordinary prudence under the same circumstances, ⁴³⁷ considering the nature of the work to be performed—was erroneous. Defendant insists that the words “skilled in the business” should have been used after the words “persons of ordinary prudence,” and that the jury should have been told to view the matter from a standpoint of an ordinarily prudent person, skilled in the business. In connection with this instruction the jury were also told that “the defendant was under no obligation to keep the plaintiff absolutely safe and free from danger, nor to insure the plaintiff against accident. Its duty, to express it tersely, was to use ordinary care to secure the plaintiff’s safety. Ordinary care, you are instructed, is the care that is ordinarily exercised by persons of average prudence under the same or similar circumstances. Just what that degree of care is, or would be, is for the jury to determine. Having determined what, under the circumstances, would have been ordinary care, it is for you to say whether such care was exercised by the defendant about the premises in question.” This instruction referred to is to be taken in connection with the former. The care to be exercised was such as is ordinarily exercised by mine owners and persons of ordinary prudence under the same circumstances. If the defendant exercised such care as an ordinarily prudent person or mine owner would have done under the same or similar circumstances, then it exercised ordinary care. The place of the injury was at the foot of the ladder constructed for the miners to ascend and descend to and from their labor. The subject discussed was that of the defective condition of the platform, and of an injury occurring to plaintiff at that place in the mine, and the question was what an ordinarily prudent man or mine owner would have done under the same or similar circumstances. The jury could make no

mistake in applying the instructions to the facts in evidence, and the care required of the defendant under such circumstances at the time and place named. The business of an ordinary miner performing services like those performed by the plaintiff ⁴³⁸ does not require the exercise of that high degree of care, skill, and workmanship as might be demanded in certain kinds of dangerous employments, where a high degree of care and skill is to be exercised to prevent injury; and while, in the former case, ordinary care is required to be exercised on the part of the employé, no greater degree of care is to be required of the master in this case than that he should have kept the premises, ladder, and platform, about which the plaintiff was employed, in a reasonably safe condition—in such a condition as the premises would ordinarily be kept by miners of ordinary prudence, under the same circumstances, considering the nature of the work to be performed. Ordinary care simply implies and includes the exercise of such reasonable diligence, care, skill, watchfulness, and forethought as, under all the circumstances of the particular service, a careful, prudent man or officer of a corporation would exercise under the same or similar circumstances. And by the term “same circumstances” is meant to include all the circumstances of time, place, and attendant conditions. As said in *Jungnitsch v. Michigan Iron Co.*, 105 Mich. 271, 63 N. W. 296: “The reduction of danger to a minimum requires the exercise of the highest degree of care attainable, and the law imposes no such duty upon the employer, but only the exercise of that reasonable care which the ordinarily prudent and careful man exercises in like or similar work”: *Wabash R. R. Co. v. McDaniels*, 107 U. S. 454, 2 Sup. Ct. Rep. 932; 16 Am. & Eng. Ency. of Law, 1st ed., 403. Like instructions to that given in this case have stood the judicial test for years, and we do not consider it advisable, in such a case as this, to modify the rule on that subject.

Exception is also taken to the refusal of the court to give defendant's request No. 12, on the subject of the exercise of reasonable care on the part of the plaintiff, and that he should not have walked blindly into danger and seek to hold defendant liable therefor, and also in failing to ⁴³⁹ give defendant's eighteenth request, as follows: “If you believe from the evidence that the ladder on which Downey went down just previous to his injury was loose and had been loose to his knowledge for some time prior thereto, then it was plaintiff's duty

at the time in question to use more care in descending the ladder in question than if the same were permanently fastened." We find no evidence to justify the giving of the twelfth request. The testimony tends to show that the master created the danger and failed to give warning of its existence to the plaintiff. Plaintiff was allowed, without warning, and while in the exercise of due care, to descend from the ladder and to fall into a hole negligently left by the master. The master had knowledge. The servant had no knowledge of the existence of the hole in the platform. Darkness prevented him from seeing that a pitfall had been dug beneath the ladder since he had last used it. Under such circumstances the servant ought not to be held negligent and the master blameless. It may be said that it is not contributory negligence not to look out for danger when there is no reason to apprehend any. This is a sound rule of law. That all men will, under ordinary circumstances, act with due care may be considered a presumption of law. But no one is authorized to rely upon this presumption if circumstances arise which would convince a reasonable man, under the circumstances, that such care was not being exercised: Beach on Contributory Negligence, 3d ed., sec. 38. The court gave full instructions on this subject of the assumed risk and care for the servant's own safety, which fully covered the above request. The question raised by the eighteenth request, as to whether the ladder was permanently fastened, and whether the plaintiff should have used more care if it were not so fastened, was not material or important, as no injury is claimed or traced to the fact that the ladder was movable. The charge of the court sufficiently covered the issue as follows: "The defendant has pleaded that the plaintiff assumed 440 the risk of being injured by the accident in question. Upon this point I charge you that if you believe from the evidence that the peril of falling into the chute or excavation referred to in the evidence was a peril incident to the employment, and was not produced by a want of ordinary care on the part of the defendant, then it is a risk assumed by the plaintiff, and he cannot recover. But if you believe from the evidence that the danger of suffering such an accident was not incident to his employment, and could have been guarded against by the exercise of ordinary care on the part of the defendant, then plaintiff did not assume the risk of such an accident, and if he was injured without fault on his part he is entitled to recover."

It is alleged that the court erred in neglecting to define the

word "negligence," or to give the defendant's request on that subject. It is true that the court, if requested, should give instructions upon any point of law relevant to the issues involved in the case before it. In doing so the court may not necessarily adopt the instructions requested in the language of counsel, but may cover the question in his own charge to the jury. The technical definition of negligence was not given, yet the court, in its general instructions, stated what the issues were, and that the action was brought to recover damages for negligently, and in the absence of reasonable care, leaving uncovered the chute or excavation at the foot of the ladder. The negligence referred to was the leaving of a hole in the wooden platform under the ladder, and in failing to warn the plaintiff of its existence. The question of negligence and contributory negligence, and the duty of each party, under the circumstances, was fully discussed and explained as bearing upon the plaintiff's right of recovery or nonrecovery. The court recited the charge as contained in the complaint, and charged the jury, among other things, that "negligence on the part of the defendant is not presumed. It is an affirmative fact, which plaintiff must prove by a preponderance ⁴⁴¹ of the evidence, and the negligent act or acts proved, if any, must be such particular acts as are alleged in the plaintiff's complaint. The burden of proof is on the plaintiff, and if you find that the evidence bearing on the question of negligence on the part of the defendant is evenly balanced, or that it preponderates in favor of the defendant, then, in that case, the plaintiff cannot recover, and your verdict must be for the defendant—no cause of action." The jury were also told that the defendant was under no obligation to keep the plaintiff absolutely safe and free from danger, nor to insure the plaintiff against accident; that its duty was to use ordinary care to secure his safety; that ordinary care is that care ordinarily exercised by persons of average prudence under the same or similar circumstances; the degree of care that is to be used is for the jury to determine. Negligence has been defined to be the failure to observe, for the protection of another's interests and safety, such care, precaution, and vigilance as the circumstances justly demand, and the want of which causes him injury. While it would have been more in accordance with the established rules of procedure to have given a request defining the technical meaning of the word "negligence," yet the instructions as a whole

leave no serious question but that the meaning of the word was conveyed to and understood by the jury.

Error is also alleged because of the refusal of the court to instruct the jury as follows: "If you find, as a fact, that an accident happened in the mine of the defendant, and as a result thereof the plaintiff was injured, this, in itself, is no proof, and raises no presumption of negligence on the part of the defendant." The court instructed the jury that negligence on the part of the defendant is not presumed; that it was an affirmative fact that the plaintiff must prove by a preponderance of the evidence; that the negligent act or acts proven, if any, must be such particular acts as are alleged in ⁴⁴³ the complaint; and that the burden of proof is on the plaintiff. This instruction is a sufficient answer to the objection.

Error is assigned to the refusal of the court to give the following instruction: "Where a mining company in the prosecution of its work in the extraction of ores and putting in timbers and floors thereon for the purpose of catching the ore as it is broken down and distributing it into various chutes, and the said floors and timbers are being from time to time changed in order to keep up with the work and receive and sort the material broken down in the further progress of such work, in such case said floors and timbers and passageways are to be deemed the work itself, and not the place of work, or the means of ingress or egress, within the rule requiring the master to keep them reasonably safe." If such a request embraced the law upon this subject in cases like the one before us, the defendant would be relieved from any responsibility of using reasonable prudence and care in the prosecution of its work, and each employé might be remediless for injuries received on account of the negligence of the master. Under it the master could, in the dark tunnels and excavations of the mine, where employés were required to pass in and out to their labor, remove the usual known means of ingress and egress or dig pitfalls in the department or place where the servants are employed or required to pass to and from their labor, of which the employés would have no information or warning, and yet remain wholly irresponsible for injuries to them through such negligence, which might, or could, have been avoided by the use of care or the timely warning of the danger. Such a doctrine might be exceedingly beneficial to the master in avoiding liability, but could hardly be considered as humane to the servant. The servant in his employment has the right to sup-

pose that the master will conduct his business as respects the servant's safety with ordinary prudence and care, and that if he makes the place where the servant is employed, or is ⁴⁴³ required to pass to his work, dangerous and unsafe, which was before reasonably safe, and is himself aware that the servant has no knowledge of the changed conditions, and it is not the duty of the servant to know of such changed conditions, then the master should warn the servant of such danger in time to prevent the injury. In the present case it appears from the testimony of the plaintiff that the master made the platform where the servant was required to pass dangerous and unsafe, and gave no warning of its condition, and thereby the servant, although using due care, as the jury found, was injured. We are of the opinion that the request was properly refused.

The court correctly charged the jury that under the facts the question of fellow-servant was not in the case, and that whatever was done by the foreman in the mine in leaving the hole in the platform was chargeable to the defendant.

Upon the whole record, we find no reversible error. The judgment of the district court is affirmed, with costs.

Baskin and Barch, JJ., concur.

The Duty of Mine Owners to prevent injury to their employes is exhaustively discussed in the recent monographic note to *Wellston Coal Co. v. Smith*, 87 Am. St. Rep. 557-595. A mine boss or foreman is a vice-principal, and not a fellow-servant of other employes: See the monographic note to *Mast v. Kern*, 75 Am. St. Rep. 626-628.

It is the Duty of a Master to use reasonable diligence in seeing that the place where his servant is at work is safe for that purpose, and the latter has a right to assume that such duty is discharged: *Western Stone Co. v. Muscial*, 196 Ill. 382, 89 Am. St. Rep. 325, 63 N. E. 664; *Illinois Steel Co. v. McFadden*, 196 Ill. 344, 63 N. E. 671, 89 Am. St. Rep. 319, and cases cited in the cross-reference note thereto. And in no case is the necessity of this rule more apparent than when applied to the relation existing between mine owners and their employes: See the monographic note to *Wellston Coal Co. v. Smith*, 87 Am. St. Rep. 559.

STATE v. KING.

[24 Utah, 482, 68 Pac. 418.]

CONSTITUTIONAL LAW—Criminal Trials—Admissibility of Former Testimony of Witness Since Deceased or Absent.—A statute providing that if the testimony of a witness is taken down by question and answer on a preliminary examination before a committing magistrate, in the presence of the defendant, who has, either in person or by counsel, cross-examined, or has had an opportunity to cross-examine, the witness, such testimony, or the deposition of such witness, may be read upon the trial upon it being satisfactorily shown to the court that he is dead or insane, or cannot, with due diligence, be found within the state, is not in conflict with a constitutional guaranty, that the accused shall have the right "to be confronted by witnesses against him." (pp. 809, 810.)

CRIMINAL LAW—Admissibility of Testimony of Witness Since Dead or Absent.—If it is shown that the accused has cross-examined a witness, or has had an opportunity of so doing upon the preliminary examination, the testimony of such witness may be read at the trial, upon its being shown to the satisfaction of the court, that such witness is dead, insane, or cannot with due diligence be found within the state. The admission of the testimony under such circumstances is not a matter of right but rests in the sound discretion of the trial court. (p. 812.)

MURDER—Indictment—Evidence of Felony.—Under an indictment for murder in the first degree simply charging the offense as willful, deliberate, and premeditated, any evidence is admissible which tends to show the facts of the killing, and also that the homicide was committed in the perpetration of a robbery, which by statute is made murder in the first degree. The indictment need not specifically allege that the homicide was committed in the perpetration of a robbery to admit proof of that fact. (pp. 813, 814.)

APPELLATE PRACTISE.—General Exceptions or exceptions to a whole paragraph in the charge of the court to the jury are insufficient to raise any question on appeal. (pp. 814, 815.)

MURDER—Conspiracy to Rob.—If two persons are associated together for the purpose of robbing a person, who is killed by one of them, either or both are chargeable with the murder, whether he or his companion fired the fatal shot. (p. 815.)

W. F. Wanless, for the appellants.

M. A. Breeden, attorney general, and W. R. White, deputy attorney general, for the state.

484 **MINER, C. J.** The information in this case charges, in the usual form, that on the eleventh day of September, 1900, in Salt Lake county, the defendants willfully, unlawfully, feloniously, deliberately, premeditatedly, and of their malice aforethought, did kill and murder Godfrey Prowse. The testimony shows that the defendants and a third man unknown

entered the gambling-house of the deceased in the night-time, with their faces masked, and with revolvers in their hands, and there shot and killed the deceased. Their evident purpose was robbery. Defendant Lynch was shot and wounded by Prowse. About thirteen shots in all were fired by all parties, most of them by the three masked men. All three masked men directed their shots at Prowse. Both defendants were identified, and revolvers were found in the alley near where the shooting was done.

Paul Johnson, an eyewitness to the shooting, was called, sworn, and examined by the prosecution, and was cross-examined by the defendants on the preliminary hearing before the magistrate. He was not present at the trial, and the prosecution, under objection, was permitted to read his testimony taken on such preliminary examination to the jury. This is alleged as error. Section 4513 of the Revised Statutes of 1898, so far as material, reads as follows: "In criminal prosecutions the defendant shall be entitled: 4. To be confronted by the witnesses against him, except that where the charge has been preliminarily examined before a committing magistrate ~~and~~ and the testimony taken down by question and answer, in the presence of the defendant, who has, either in person or by counsel, cross-examined, or has had an opportunity to cross-examine, the witness, or where the testimony of a witness on the part of the state, who is unable to give security for his appearance, has been taken conditionally in like manner in the presence of the defendant, who has, either in person or by counsel, cross-examined, or has had an opportunity to cross-examine, the witness, the deposition of such witness may be read, upon it being satisfactorily shown to the court that he is dead or insane, or cannot, with due diligence, be found within the state." The appellants contend that this statute is unconstitutional, within the meaning of section 12, article 1 of the constitution, which provides that the accused shall have the right "to be confronted by witnesses against him," and that no sufficient foundation was laid for the introduction of the testimony of the witness Johnson. It appears from the record that witness Johnson was sworn and examined upon the preliminary hearing before the magistrate, and that the accused and his counsel had an opportunity, and did cross-examine him. Mr. Barrett, a person with whom Johnson was rooming at the time, and who was intimately acquainted with him, testified that he did not think Johnson was in the city; that he

last saw him three weeks prior to the time of the trial, at which time he was rooming with the witness; that when he left he said he was going to Oregon that day; that he left the city about three weeks prior, and witness had not seen him since. A police officer testified that he knew Johnson, and served a subpoena on him on the twelfth day of October, to appear at the trial set for October 22d. This subpoena was duly returned. Johnson said to the policeman, when subpoenaed, that he was going away, but would return. The witness stated that he had not seen him since. Mr. Sheets, a police officer, testified that he saw Johnson on the 12th of October, but had not seen him since; that at that time Johnson said he was going away to ⁴⁸⁶ the state of Oregon, and said he would write a letter back so his address would be known; that no letter had been received from him. Witness further stated that Johnson was not in the city. Johnson's name was called in court, but he did not answer. When the case was continued from the twenty-second to the twenty-ninth day of October, an order was made by the court requiring all witnesses to be present in court on the 29th. Johnson was not present in court at this time. A subpoena was duly issued for him, and thereafter, on the same day, was duly returned, showing that, after due diligence, search, and inquiry by different police officers, the witness could not be found, and his whereabouts were unknown. Every effort possible was made to find the witness, without avail. As a general rule, under constitutions like that of Utah, the accused is entitled to be confronted with the witnesses against him. As held in *State v. Mannion*, 19 Utah, 505, 512, 75 Am. St. Rep. 753, 57 Pac. 542, 544: "Under the constitution and statutes of the state the accused had a right to be present at the trial, to be confronted by the witnesses against him, and to meet his accusers face to face. He also had the right to appear and defend against the accusation preferred against him in person and by counsel. He had the right not only to examine the witnesses, but to see into the face of each witness while testifying against him, and to hear the testimony given upon the stand. He had the right to see and be seen, hear and be heard, under such reasonable regulations as the law established. By our constitution it is clearly made manifest that no man shall be tried and condemned in secret, and unheard." The chief purpose in requiring that the accused shall be confronted with the witnesses against him is held to be to secure to the defendant an opportunity for cross-

examination; so, that if the opportunity for cross-examination has been secured, the test of confrontation is accomplished. If the confrontation can be had it should be had. By taking the testimony of the witness Johnson in the presence of the ⁴⁸⁷ accused upon the examination at a time when he had the privilege of cross-examination, this constitutional privilege is satisfied, provided the witness cannot, with due diligence, be found within the state. The constitutional requirement of confrontation is not violated by dispensing with the actual presence of the witness at the trial after he has already been subjected to cross-examination by the accused, and the other requirements of the statutes have been complied with. In 1 Greenleaf on Evidence, sixteenth edition, section 163g, page 284, it is said: "The death of the witness has always, and as of course, been considered as sufficient to allow the use of his former testimony. The absence of the witness from the jurisdiction, out of reach of the court's process, ought also to be sufficient, and is so treated by the great majority of courts. Mere absence, however, may not be sufficient, and it is usually said that a residence or an absence for a prolonged or uncertain time is necessary. A few courts do not recognize at all this cause for nonproduction; a few others deny it for criminal cases. Neither position is sound. Inability to find the witness is an equally sufficient reason for nonproduction, by the better opinion, though there are contrary precedents. The sufficiency of the search is usually and properly left to the trial court's discretion. Absence through the opponent's procurement should, of course, be a sufficient reason for nonproduction. Illness, by causing inability to attend, has the same effect. The phrase usually employed as a test is, 'so ill as to be unable to travel.' The application of the principle should be left to the trial court's discretion." Numerous citations of authority will be found in the notes to this section. In *Finn v. Commonwealth*, 5 Rand. 701, *Mendum v. Commonwealth*, 6 Rand. 704, and *Brogy v. Commonwealth*, 10 Gratt. 722, witnesses who had testified on a former trial were not dead, but were out of the state, and the testimony was held to be admissible, the same as if the witnesses were dead. In *People v. Oiler*, 66 Cal. 101, 4 Pac. 1066, the testimony of a witness taken on a preliminary examination was admitted on the trial under a ⁴⁸⁸ provision of the statute applicable to a deceased witness, and the statute was held constitutional. The same rule is held in *Summons v. State*, 5 Ohio St. 325;

Howard v. Patrick, 38 Mich. 795; *Mattox v. United States*, 156 U. S. 237, 15 Sup. Ct. Rep. 337; *Cooley's Constitutional Limitations*, 587. The principal object of the provision in the constitution was to prevent depositions or *ex parte* affidavits from being used against the accused in the place of a personal examination and cross-examination of the witness, wherein the accused would have an opportunity to cross-examine, and thereby test the recollection and truthfulness of the witness, and also to compel him to stand face to face with the jury, counsel, and accused, that they might look at him and judge of his truthfulness and candor and of his testimony by his manner of testifying. As said in *Mattox v. United States*, 156 U. S. 243, 15 Sup. Ct. Rep. 339: "There is doubtless reason for saying that the accused should never lose the benefit of any of these safeguards, even by the death of the witness, and that, if notes of his testimony are permitted to be read, he is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection. But general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. . . . The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused." Under our statute it was necessary for the prosecution to show that the accused had cross-examined the witness, or had an opportunity of so doing upon the examination, and then the testimony of such witness may be read, upon its being shown, to the satisfaction of the court, that said witness was dead, insane, or could not, with due diligence, be found within the state. The testimony tends to show that the witness could not be found, and the trial court had a right to exercise his discretion in the admission of the testimony, provided ⁴⁹⁹ he did not abuse such discretion. The reasons given for the absence of the witness were reasonable, and were satisfactory to the trial court. We are not prepared to say that the discretion of the court was improperly exercised in the admission of the testimony of Johnson upon the preliminary showing made. We hold that the statute referred to is valid, and within the provisions of the constitution.

2. It is also contended that the information does not allege that the offense was committed in an attempt to perpetrate any arson, rape, burglary, or robbery, but simply alleges that the

accused did willfully, deliberately, maliciously, and with premeditated malice, kill and murder the deceased, without setting out therein that the offense was committed in the perpetration of robbery, etc., and that evidence was admitted showing that the offense was committed while perpetrating or attempting to perpetrate a robbery, and that the charge of the court upon this subject was erroneous. Section 4161 of the Revised Statutes of 1898 reads as follows: "Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed; or perpetrated by any act greatly dangerous to the lives of others and evidencing a depraved mind, regardless of human life—is murder in the first degree. Any other homicide committed under such circumstances as would have constituted murder at common law, is murder in the second degree." Under this statute every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, premeditated killing is murder in the first degree. If the murder charged was committed in the attempt to commit a robbery, etc., it is also murder in the first degree, but in such a case no intent to kill, and no deliberation and premeditation, was necessary; the implied ⁴⁹⁰ malice involved in the felonious intent to rob being sufficient to establish the malicious intent. The attempt to perpetrate the crime of robbery, or any other felony named in the statute, during which a homicide is committed, takes the place of, and amounts to the legal equivalent of, such deliberation, premeditation, and design, which were otherwise necessary attributes of murder in the first degree. This, at least, has been the holding of many courts, notably the case of *Commonwealth v. Flanagan*, 7 Watts & S. 415, and *Titus v. State*, 49 N. J. L. 36, 7 Atl. 621. At common law it was not necessary to charge in the indictment that the murder was committed in the perpetration of another crime in order to introduce proof showing that a felony was attempted in committing it. It was sufficient to charge murder in the common form, and then, upon proof that it was committed in the perpetration of a felony, malice, deliberation, and premeditation were implied: 2 Bishop's Criminal Law, sec. 694; 1 Hale's Pleas of the Crown, 465. So that the indictment in the form

used was sufficient under the statute to charge murder in the first degree, and it is immaterial whether the murder was charged to have been committed in the perpetration of robbery, etc., or not. Under such an information evidence was admissible which tended to show the facts of the killing, and also that the crime was committed in perpetrating a robbery. We are also of the opinion that the instructions given to the jury upon this subject were proper. The charge contained in the information was for murder in the first degree. In 1 McClain on Criminal Law, section 355, the rule is stated as follows: "The statutes defining murder in the first degree, perhaps without exception, include cases where the homicide results during the perpetration or attempt to perpetrate certain felonies named, those usually included being arson, rape, robbery, mayhem, and burglary. As has been shown, a homicide resulting from the commission or attempt to commit a felony is with malice aforethought, and is therefore murder. And the effect of the statutory provision as to the first degree is to make criminal in that ⁴⁹¹ degree the murder resulting from committing or attempting to commit the particular felonies specified. No intent to kill, and no deliberation and premeditation, are necessary, the implied malice involved in the felonious intent being sufficient. The intent to commit one of the named felonies in itself constitutes deliberation and premeditation, and therefore, under an indictment for the first degree, charging the offense as willful, deliberate, and premeditated, evidence is admissible that the homicide was committed in the perpetration of robbery, one of such felonies; or where a common-law form of indictment is sufficient for the first degree, proof of the first degree by the commission of a named felony may be made under such an indictment. The indictment may, however, allege fully the commission of the felony, and the murder may then be charged as having been committed while in the perpetration of such felony": *State v. Johnson*, 72 Iowa, 393, 34 N. W. 177; *State v. Meyers*, 99 Mo. 107, 12 S. W. 516; *Cox v. People*, 80 N. Y. 500; *People v. Willett*, 102 N. Y. 251, 6 N. E. 301; *People v. Olsen*, 80 Cal. 122, 22 Pac. 125; *Commonwealth v. Flanagan*, 7 Watts & S. 415; *Titus v. State*, 49 N. J. L. 37, 7 Atl. 621; 2 Bishop's Criminal Law, sec. 694.

3. General exceptions were taken to the instructions of the court. As frequently held by this court, exceptions to a whole paragraph in the charge of the court to the jury are insufficient

to raise any question: *Wilson v. Mining Co.*, 16 Utah, 392, 52 Pac. 626; *Lowe v. Salt Lake City*, 13 Utah, 91, 57 Am. St. Rep. 708, 44 Pac. 1050; *Nebeker v. Harvey*, 21 Utah, 363, 60 Pac. 1029. However, we have examined the charge of the court, and find that it sufficiently covers the legal questions raised in the case. It also embodies such parts of the instructions requested by the defendants as were proper to submit to the jury.

4. If it is claimed by the defendants that the testimony shows that a third person was present taking part in the alleged attempt to rob, and also participated in the shooting of Prowse, ⁴⁹² and that such person is not named or made a defendant in this indictment, and that the defendants are improperly held responsible for his acts, when they could only be held responsible for the commission of such crimes as come within the intent of the conspirators, and it is claimed that the court improperly instructed the jury upon the liability of these defendants for the acts of the third party. The parties were all associated together for the purpose of robbery, and in attempting to carry out their intent to rob they, or some of them, shot and killed Prowse. They were unlawfully associated together in a common design and illegal conspiracy to commit a felony, and, therefore, the killing of the deceased, by whomsoever of the parties present it was done, was the act of each and all of the conspirators, and the defendants are chargeable therewith, whether they or the absent party fired the fatal shot. This doctrine was clearly held in *State v. Morgan*, 22 Utah, 162, 170, 61 Pac. 527, 529. In that case the court said: "The testimony clearly shows that the defendant, to prevent his arrest and capture for a felony, deliberately shot and killed Brown; but, even if the killing was not directly traced to the defendant, still the record shows that in connection with their criminal acts these two men were acting in concert to rob and resist arrest even to the killing of other persons, and, being so associated and confederated together in their felonious purposes of robbery and resistance to the civil power of the state, the killing of the deceased, by whomsoever it was done, was the act of each and both of the conspirators, and thereby the defendant is chargeable therewith, whether he or his companion fired the fatal shot: *People v. Coughlin*, 13 Utah, 58, 44 Pac. 94; *People v. Pool*, 27 Cal. 573; 3 *Greenleaf on Evidence*, sec. 94; *State v. Mowry*, 37 Kan. 369, 15 Pac. 282." We not only find the instructions upon this subject proper, but are

clearly of the opinion that the requests offered by the defendants were properly refused, and that the court committed no error upon the subject to which an exception was taken.

⁴⁹³ Other exceptions were taken to the proceedings, but, upon careful examination of the questions raised, we find them without merit. Upon the whole record we find no reversible error.

The judgment and sentence of the district court is affirmed, and the case remanded to said court, with instructions to execute the judgment and sentence in accordance with law.

Baskin and Bartch, JJ., concur.

Evidence at a Former Trial and its admissibility are considered in the monographic note to *Railroad Co. v. Osborn*, ante, pp. 192-208. The testimony of a witness, who has since died, taken at and reduced to writing at the preliminary examination in a criminal case, cannot be used against the accused upon the trial: *Cline v. State*, 36 Tex. Cr. Rep. 320, 36 S. W. 1099, 37 S. W. 722, 61 Am. St. Rep. 850, and see the monographic note thereto on the admissibility of the evidence of absent witnesses in criminal trials.

CASES
IN THE
SUPREME COURT
OF
WASHINGTON.

DITMAR v. DITMAR.

[27 Wash. 13, 67 Pac. 353.]

DIVORCE—Support of Children.—A Divorced Wife, having the custody of the children, may sue her former husband for expenses incurred in their support and also for their future support. (pp. 818, 819.)

ATTORNEY'S FEES.—In an Action by a Divorced Wife against her former husband for the support of their children, she cannot recover attorney's fees. (p. 819.)

N. T. Caton and Mount & Merritt, for the appellant.

Martin & Grant, for the respondent.

13 FULLERTON, J. The appellant and respondent were formerly husband and wife, having been lawfully married ¹⁴ in the state of Oregon in August, 1879. There were born to them five children, who were, on the third day of May, 1895, of the respective ages of fifteen, thirteen, thirteen, ten and seven years. On the date last named a divorce was granted the respondent from the appellant, in the decree for which she was awarded the care and custody of the children, the court finding that the appellant was "by conduct and character" an unfit person to have their care or control. The property of the parties, which was not of any considerable value, was divided between them, the wife receiving the major portion. This action was instituted in July, 1899, by the respondent, to recover from the appellant the amount expended by her in the care and maintenance of the children subsequent to the divorce, and to compel him to make suitable provision for their

future support. The trial court found that the respondent had expended in the care and education of the children the sum of four hundred and ninety-five dollars over and above the value of their labor; that the three older children were able to care for themselves; that the others were not so, and that the sum of twelve dollars and fifty cents per month was necessary for their future maintenance and education above such support as the respondent was able to furnish. It was also found that the respondent was without property more than sufficient to meet her outstanding obligations; that the appellant had ample means to support the children, and had refused, when requested so to do, to contribute anything whatsoever to their support. On these findings a decree was entered awarding to the respondent one-half of the sum the court found she had theretofore expended in the maintenance and education of the children, and directing him to pay toward the future support and education of the younger children the sum of twelve dollars and fifty cents per month until ¹⁵ the further order of the court; further decreeing that the appellant pay into court the sum of one hundred dollars for the use of respondent as attorney's fees.

The learned counsel for the appellant make no question on the facts found by the court, but plant themselves upon the broad proposition that a divorced wife cannot maintain an action against her former husband for expenses incurred by her in the support of their minor children, where in the decree for divorce the custody of such children has been awarded to her, or for their future support so long as she maintains their custody and control. Many cases are cited which seemingly support their contention, and it may be, as counsel contend, that the weight of authority is with them. The contrary view, however, is not without support in authority from other jurisdictions, and we have held that such an action could be maintained: *Gibson v. Gibson*, 18 Wash. 489, 51 Pac. 1041. It is true that in that case the question of the right to recover for moneys expended for past support was not directly involved, yet the court reviewed certain of the authorities cited maintaining the position that such expenditures were not recoverable, and said it did not think they were rightly decided; saying further that those decisions lost sight of the fact that the right to the services of the children had been forfeited by the father, and that it "violates our sense of justice to allow a father to plead his own wrong as an excuse for relieving him-

self from an obligation. Presumably the custody of the child is taken from him because he is not worthy of its care and custody, and this doctrine in effect releases from an obligation the unworthy parent and imposes an additional burden upon the worthy one." This argument applies with all its force to the case before us. ¹⁶ Here, the wife was granted a divorce from the husband because of his extreme cruelty. He was also found to be unfit in conduct and character to have the control of their children. Clearly, the wife has every right, moral and equitable, to be reimbursed to the amount of a just proportion of the expense she has been put to in the performance of a duty which equally belonged to both; and the technical legal reason on which the contrary doctrine is based ought not to be permitted to outweigh the evident justice of her claim. On principle we believe the doctrine of the case from this court to be right, and, though strongly urged so to do, we must decline to either overrule or modify it.

The court erred, however, in allowing the attorney fee: *Trumble v. Trumble*, 26 Wash. 133, 66 Pac. 124. For this error the cause will be remanded to the lower court, with instructions to modify the decree by striking out the clause requiring it to be paid. In all other respects the decree will stand affirmed.

Reavis, C. J., and Dunbar and Anders, JJ., concur.

Mount, J., not sitting.

A Divorced Husband may be liable to his former wife for the support of their children while they live with her: *Zilley v. Dunwiddie*, 98 Wis. 428, 67 Am. St. Rep. 820, 74 N. W. 126; *Pretzinger v. Pretzinger*, 45 Ohio St. 452, 4 Am. St. Rep. 542, 15 N. E. 471. Compare *Fulton v. Fulton*, 52 Ohio St. 229, 49 Am. St. Rep. 720, 39 N. E. 729; *Foss v. Hartwell*, 168 Mass. 66, 60 Am. St. Rep. 366, 44 N. E. 411; and see the discussion of this question in the monographic note to *Hall v. Green*, 47 Am. St. Rep. 314-317.

CHAPPELL v. PUGET SOUND REDUCTION COMPANY.

[27 Wash. 63, 67 Pac. 891.]

CONVERSION OF STANDING TIMBER—Damages.—If one, under the mistaken idea that standing timber is his, converts it into cordwood, the measure of damages is the value of the timber standing. (pp. 822, 824.)

WITNESSES.—A Party is Bound by the Testimony of his own witness, when his is the only evidence on the point introduced. (p. 824.)

Whitney & Headlee, for the appellant.

F. H. Brownell and Cooley & Horan, for the respondent.

⁶⁴ MOUNT, J. This action was brought for the value of one thousand cords of wood, alleged to have been wrongfully taken from plaintiff's land by one Thomas Diffley, and by Diffley shipped to Everett and sold to the defendant. Plaintiff claims the value of the wood at Everett, which is two dollars and thirty-two and one-half cents per cord, while defendant maintains, as the lower court held, that plaintiff was entitled to the value of the timber standing on the premises, which is ten cents per cord. The undisputed facts in the case are as follows: On June 24, 1897, Stephen Parr and wife were the owners and in possession of one hundred and sixty acres of timber land in Snohomish county. On that date they sold, and, by a contract in writing, in consideration of six hundred dollars, conveyed, all the timber upon the tract of land to a copartnership composed of L. H. Cyphers and Ulmer Stinson, under the name of Cyphers & Stinson. In this contract of sale it was agreed that the timber should be removed from the land within two years after the date of the contract. A right of way over the ⁶⁵ said premises for logging roads, however, was granted for a term of five years. Four days after the date of this contract, on June 28, 1897, Parr and wife, in consideration of one hundred dollars, sold the land to one Frank Campbell, an uncle of plaintiff, subject to the sale of timber and right of way above named. On the thirteenth day of October, 1897, Thomas Diffley purchased the timber upon the tract of land mentioned from Cyphers & Stinson for a consideration of six hundred dollars, and the contract above mentioned was assigned to him. At the time Diffley purchased the timber from Cyphers & Stinson, he

supposed Parr was still the owner of the land, and at that time went to see Parr, and told him he had purchased the timber, and that the time for removing the same would expire in something over a year, and thereupon Parr said to Diffley: "Tom, you can have all the time you want to. I'll never bother you." Diffley thereupon took possession of the premises, and continuously thereafter until this action was brought was in possession thereof, cutting and removing cordwood therefrom. On March 17, 1898, Frank Campbell sold the land to plaintiff in consideration of two hundred dollars, subject to the sale of timber and right of way for logging roads above mentioned. At the time plaintiff purchased the land, Diffley was in possession of it, engaged in removing timber therefrom. Plaintiff knew this, and said nothing to Diffley, although he was upon the land as often as once a month from the time he purchased it. In April or May, 1900, plaintiff served a written notice on Diffley "to quit cutting wood there, and not take any more off." Diffley at this time told plaintiff that "he didn't think he would quit." In about ten days thereafter plaintiff went to Diffley again, and (using his language) said: "And I asked him if he was still going to keep on cutting, or whether he was going to quit, or whether he was going to pay any attention to the notice "as that I gave him to stop, and he said that he was going to keep right on. He said that he had bought that timber, and he would like to see the man to stop him from cutting it off." About the middle of June, 1900, plaintiff notified defendant by telephone that the wood they were buying from Diffley belonged to the plaintiff, and not to pay Diffley any more money therefor. In August following, plaintiff brought this action to recover the value of all wood cut after the twenty-fourth day of June, 1899, which was alleged at one thousand cords, at a value of two thousand six hundred dollars. On the trial the jury found that three hundred and twenty-eight cords had been taken between June 24, 1899, and August 23, 1900, the time of the commencement of this action, and that the stumpage value thereof was thirty-two dollars and eighty cents. From a judgment for this amount, plaintiff appeals.

There is no contention in this case that there were any special damages to the land, or any willful or malicious trespass. The complaint alleges a wrongful entry upon the premises, and the conversion of one thousand cords of wood, of the value of two thousand six hundred dollars. The undisputed facts do not show any willful or malicious trespass. It is true the time ex-

pressed in the contract for removing the timber expired on June 24, 1899, and that in April or May, 1900, Diffley was notified by plaintiff not to remove any more timber; but these facts do not make Diffley a willful or malicious trespasser in taking the timber, because he had purchased it, and supposed in good faith that he was still the owner of it. If the action had been brought under the statute which provides for treble damages in case of willful or malicious trespass, the bona fides of Diffley would have been a question for the jury, under sections 5656 and 5657 of Ballinger's Code. But since the action is one merely for damages in taking and converting the wood alleged in the complaint, the question of mala fides is not for the jury. It ⁶⁷ was only for the jury to determine in this case whether the taking was wrongful, and, if so, to determine single damages at the time and place of conversion: *McLeod v. Ellis*, 2 Wash. 117, 26 Pac. 76.

The great weight of authority in the United States in regard to the measure of damages in cases of this character is as expressed in *Bolles Woodenware Co. v. United States*, 106 U. S. 432, 1 Sup. Ct. Rep. 398, where it is held that where the defendant was an unintentional or mistaken trespasser, or his innocent vendee, the measure of damages is the value at the time of conversion, less what the labor and expenses of his vendor have added to its value. In *Ayres v. Hubbard*, 57 Mich. 322, 58 Am. Rep. 361, 23 N. W. 829, the court, in a case similar to the one at bar, says: "The general rule of damages is the value of the property lost under such circumstances at the time and place of conversion," and "complete indemnity for the actual loss sustained in this case by the plaintiff is what he was entitled to recover."

In *Cushing v. Longfellow*, 26 Me. 306, it was held that the plaintiffs have no right to select any other place than that where the injury was originally done, to enhance the value of the article taken. The value of the property severed from the freehold is that which it has immediately after being severed. In *Carroll v. More*, 30 Wis. 574, it was held that where no circumstances of fraud, malice, or wanton injury are done by the trespass, the value of the logs cut, or, as it is sometimes called, the value of the stumpage, would seem to be the measure of just compensation. This rule in Wisconsin has since been modified by statute. In *Coxe v. England*, 65 Pa. St. 212, the court said: "This was an action of trespass for cutting standing timber. Its value was, therefore, to be ascertained by the ⁶⁸ price of

such timber in the vicinity, and not by the net value of the logs cut from it, in a distant market. The evidence shows that the timber had a price where it stood, the value of stumpage, as it is termed, being proved by numerous witnesses."

To the same effect see *Tilden v. Johnson*, 52 Vt. 628, 36 Am. Rep. 769; *Ward v. Carson River Wood Co.*, 13 Nev. 44; *Gardere v. Blanton*, 35 La. Ann. 811; *Railway Co. v. Hutchins*, 32 Ohio St. 571, 30 Am. Rep. 629; *Railway Co. v. Hutchins*, 37 Ohio St. 282, 296; *White v. Yawkey*, 108 Ala. 270, 54 Am. St. Rep. 159, 19 South. 360; *Bailey v. Chicago etc. Ry. Co.*, 3 S. Dak. 531, 54 N. W. 596.

In the case of *Beede v. Lamprey*, 64 N. H. 510, 10 Am. St. Rep. 426, 15 Atl. 133, the court, after reviewing very many cases, says: "The weight of authority, however, in this country is in favor of the rule which gives compensation for the loss—that is, the value of the property at the time and place of conversion with interest after, allowing nothing for value subsequently added by the defendant, when the conversion does not proceed from willful trespass, but from the wrongdoer's mistake or from his honest belief of ownership in the property, and there are no circumstances showing a special and peculiar value to the owner, or a contemplated special use of the property by him."

In the case of *King v. Merriman*, 38 Minn. 47, 35 N. W. 570, which is very much the same as the case under consideration, the court lays down the rule for the measure of damages substantially as follows: "Where defendant is an unintentional or mistaken trespasser, or where he honestly and reasonably believed that his conduct was rightful, the value of the property at the time it was taken—that is, the value of the timber standing": See, also, *Sedgwick on Damages*, 8th ed., secs. 933, 934, 563; 3 *Sutherland on Damages*, 2d ed., secs. 1019, 1020.

This rule, it seems to us, is particularly applicable to the case in hand. In this case the land has not been injured. There is no claim that the timber had any special value for any other purpose than cordwood. It appears by some of the witnesses that the timber fit for shingles and lumber had been removed, and what was left was "poor stuff," and that its removal would benefit the land. Diffley had purchased the timber; had been permitted for a year after the time specified in his agreement to continue to remove the timber with full knowledge of the owner of the land. He supposed he owned the timber. He certainly had a right to suppose he owned it, under

the circumstances. Standing timber fit for cordwood in that vicinity was, and had been, selling at ten cents per cord. When it was manufactured into cordwood and shipped by wagon and rail to Everett, it was worth two dollars and thirty-two and one-half cents per cord; that is to say, the labor of one who had paid for the timber standing, and who supposed he owned it, had made the value more than twenty times its value standing. By what rule of right can it be held that one who stands by and sees his property thus enhanced in value by the labor of another shall reap all the benefit of this added labor, and contribute nothing himself except his negligence? If there was any question between plaintiff and Diffley as to who was the owner of the timber, it seems that the plaintiff should have taken some steps to have determined that question, and in default thereof he must be relegated to his right of recovery for actual damages. A premium so great as the one sought here ought not to await plaintiff as the reward for his negligence in not taking some active steps to determine that question, and then the burden of paying it be visited, probably, upon an innocent purchaser, who has already paid the market price for the wood.

In the trial of the cause in chief plaintiff called Thomas ⁷⁰ Diffley as a witness to prove his case. Diffley testified that after June 24, 1899, he did not take to exceed four hundred cords of wood from the premises. There was no other evidence of the actual amount taken. The court, upon this evidence, instructed the jury that, if they found in favor of the plaintiff, they could not find for a greater amount than four hundred cords. The plaintiff was bound by his own evidence in this respect, and it was not error for the court to so instruct the jury.

Finding no error in the record, the cause will be affirmed.

Reavis, C. J., and Dunbar, Fullerton, Hadley, White and Anders, JJ., concur.

Conversion.—The Measure of Damages in trover when the value of the property is enhanced by the wrongdoer is considered in the monographic notes to *Baker v. Wheeler*, 24 Am. Dec. 70-80; *Gaskins v. Davis*, 44 Am. St. Rep. 444-448. When, through an inadvertent trespass, timber is cut, the measure of damages is usually considered to be the value of the timber immediately after being severed from the land, with interest and compensation for any injury to the land: *White v. Yawkey*, 108 Ala. 270, 54 Am. St. Rep. 159, 19 South. 360; *Gaskins v. Davis*, 115 N. C. 85, 44 Am. St. Rep. 439, 20 S. E. 188; *Beede v. Lamprey*, 64 N. H. 510, 10 Am. St. Rep. 426, 15 Atl. 133. Compare *Wing v. Milliken*, 91 Me. 387, 64 Am. St. Rep. 238, 40 Atl. 138; *Powers v. Tilley*, 87 Me. 34, 47 Am. St. Rep. 304, 32 Atl. 714.

WENDEL v. SPOKANE COUNTY.

[27 Wash. 121, 67 Pac. 576.]

PUBLIC LANDS—Injury to Homestead.—An entryman under the federal homestead laws may bring an action for injury to his land, although he has not yet made final proof. (p. 826.)

MUNICIPAL CORPORATIONS—Ultra Vires.—A municipal corporation is not liable for an act wholly beyond the scope of its powers, but it is answerable for a wrongful act done in the execution of its authority. (p. 826.)

COUNTY ROAD—Injury from Construction of.—If, in the construction of a county road, the water of a lake is drained onto lower lands, the county is liable for the injury occasioned, irrespective of negligence. (pp. 826, 828.)

Shine & Winfree, for the appellants.

Miles Poindexter and James Z. Moore, for the respondent.

122 DUNBAR, J. This is an action for damages caused by draining the waters of a lake in Spokane county onto the lands of the plaintiffs, done by order of the board of county commissioners in constructing a road across said lake. The complaint alleges, in substance, that plaintiff Frank Wendel had entered the lands as a homestead under the homestead laws of the United States, and that he and his wife have ever since lived on said lands and cultivated them under the said homestead laws, but have not yet made final proof; that the board of county commissioners of Spokane county ordered a county road to be surveyed, laid out, established, and built, a portion of the road running through Turnbull Lake; that they took a portion of the bed of said lake for the purpose of building the road, disregarded the surveyor's recommendation that a bridge be built over said lake, and ordered a canal or ditch to be cut out of said lake between the said roadbed and the plaintiffs' land; that the ditch was for the purpose of draining a portion of the said lake so that the road might be built thereon; that the said canal or ditch was constructed and finished by defendant, and was cut through a natural ridge of land which had theretofore protected plaintiffs' land from the overflow of said lake; that it was cut in order to give an outlet for the water on said roadbed for the purpose of avoiding the necessity of maintaining a bridge; that the road was laid out, established, built, and constructed by Spokane county, and **123** is now being used by said county as a county road, and that the said

waters of said roadbed have been since said date, and are now being, drained through said ditch; alleging the damages arising from the emptying of the waters upon plaintiffs' land. A demurrer was interposed to this complaint on the ground that it did not state facts sufficient to constitute a cause of action, which demurrer was sustained, and, the plaintiffs electing to stand upon their complaint, judgment was entered dismissing the action, from which judgment this appeal is taken.

It is claimed by the respondent that there was not sufficient allegation of ownership in the land to maintain this action. We think, however, that the allegations set forth in the complaint above noted were sufficient: *Yakima County v. Tullar*, 3 Wash. Ter. 393, 17 Pac. 885; *Pierce v. Frace*, 2 Wash. 81, 26 Pac. 192, 807.

The main contention, however, is that the act complained of was beyond the legal power of the county, and therefore *ultra vires*; or, reduced to logical statement, that the county had no right to commit the act which caused the damage, and is therefore not responsible. A great many of the cases cited by respondent are to the effect that the county cannot do an unlawful act, and that, if such act is done by an officer of a municipal corporation, the corporation is not liable in any event. These cases are not in point in this state, where the opposite doctrine has been uniformly held: *Kirtley v. Spokane County*, 20 Wash. 111, 54 Pac. 936; *Einseidler v. Whitman County*, 23 Wash. 388, 60 Pac. 1122; *Commercial Electric etc. Co. v. Tacoma*, 20 Wash. 288, 72 Am. St. Rep. 103, 55 Pac. 219.

In discussing the liability of municipal corporations for acts committed by their officers which are defended on ¹²⁴ the ground of the same being *ultra vires*, we must not lose sight of the distinction which exists between acts which are absolutely *ultra vires* by reason of the corporation having no authority to act on the subject matter—it being wholly beyond the scope of its powers—and those acts which, in a sense, are termed *ultra vires*, where the body has jurisdiction of the subject matter, but, in the execution of its authority, trespasses upon the rights of others. In the first instance, it is conceded by all authority that the corporation is not liable, and in the second, by almost universal modern authority, that it is; that the wrongful act may be the foundation of an action for damages against the corporation, and that such action will lie against the corporation either when the act is done by its officers under its authority or has been ratified by it. Keeping these distinctions in

view, it is not difficult to determine that the action will lie in this case if the allegations of the complaint are true; for the action of the county in this respect was not in reference to a matter which was entirely without its authority and scope. On the contrary, it was acting upon a subject especially relegated to its management and control by the laws of the state.

Respondent says that this damage, if any was caused, was caused over seven miles from the roadbed. It makes no difference whether the damages were sustained seven miles or seven feet from the roadbed. It might be a little more difficult to prove that the action of the county at that distance was the proximate cause of the injury, but that is a question which will be submitted to the discretion of the jury. The contention of the respondent that the county cannot be held responsible for injuries occurring off of or beyond the roadbed resulting from the building of the road cannot be sustained by either reason¹²⁵ or authority. It might as well be said that if the roadbed was covered with boulders, they could be rolled off by order of the county onto adjoining lands, or that the county could sluice mud or water from the roadbed onto adjoining lands, or even lands at a distance, and shift the liability to the individuals who did the work. Such a claim is aptly criticised by the supreme court of the United States in *Salt Lake City v. Hollister*, 118 U. S. 256, 6 Sup. Ct. Rep. 1055, in the following language: "It is said that the acts done are not the acts of the city, but of its officers or agents who undertook to do them in its name. This would be a pleasant farce to be enacted by irresponsible parties, who give no bond, who have no property to respond to civil or criminal suits, who make no profit out of it, while the city grows rich in the performance."

The circumstances in the case cited were different from those in this case, but the principle involved in relation to the liability of the corporation is exactly the same.

It is insisted that there is no allegation of carelessness or negligence in the complaint. No such allegation is necessary. If the allegations of the complaint are true, it is the taking of private property for public use without compensation, and falls within the prohibition of the constitution (article 1, section 16) so often construed by this court. And it makes no difference whether it was done negligently or carefully. The taking is what the constitution prohibits: *Brown v. Seattle*, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214; *State v. Superior Court of King County*, 26 Wash. 278, 66 Pac. 385.

In any view of the case the county has ratified the action, whoever may have been originally responsible for it: *Commercial Electric etc. Co. v. Tacoma*, 20 Wash. 288, 72 Am. St. Rep. 103, 55 Pac. 219.

¹²⁶ As sustaining the view that the action of the county in draining the lake for the purpose of building the road is not ultra vires to such an extent that the county can escape responsibility for damages resulting from such work, see *Ashley v. Port Huron*, 35 Mich. 296, 24 Am. Rep. 552; *Pumpelly v. Green Bay Co.*, 13 Wall. 166; *Arimond v. Green Bay etc. Canal Co.*, 31 Wis. 316; *Eaton v. Boston etc. R. R. Co.*, 51 N. H. 504, 12 Am. Rep. 147; *Tyler v. Tehama County*, 109 Cal. 618, 42 Pac. 240; *McClure v. Red Wing*, 28 Minn. 186, 9 N. W. 767; *Hendershott v. Ottumwa*, 46 Iowa, 658, 26 Am. Rep. 182.

Some other minor objections to the complaint are raised, which, we think, are not meritorious. The complaint stating a cause of action against the county, the judgment will be reversed, with instructions to the lower court to overrule the demurrer.

Reavis, C. J., and Anders, Mount, White, Fullerton and Hadley, JJ., concur.

The Liability of Municipal Corporations for the acts of their officers and agents is considered in the monographic note to *Goddard v. Harpswell*, 30 Am. St. Rep. 376, 413. A municipal corporation is not liable for the acts of its servants and agents which it has no power to authorize: *Gross v. Portsmouth*, 68 N. H. 266, 73 Am. St. Rep. 586, 33 Atl. 256; monographic note to *Hilsdorf v. St. Louis*, 100 Am. Dec. 358. In general, however, a municipality, like an individual, is answerable for neglect or omissions resulting in injury or damages: *Potter v. New Whatcom*, 20 Wash. 589, 72 Am. St. Rep. 135, 56 Pac. 394. But see *Prichard v. Board of Commrs.*, 126 N. C. 908, 78 Am. St. Rep. 679, 36 S. E. 353. If a city or township causes water to flow or settle upon private property, it is answerable therefor: *City of Brunswick v. Tucker*, 103 Ga. 233, 68 Am. St. Rep. 92, 29 S. E. 701; *Mayor v. Sikes*, 94 Ga. 30, 47 Am. St. Rep. 132, 20 S. E. 257; *Patoka Township v. Hopkins*, 131 Ind. 142, 31 Am. St. Rep. 417, 30 N. E. 896; *Kelly v. Pittsburgh etc. R. R. Co.*, 28 Ind. App. 457, 91 Am. St. Rep. 134, 63 N. E. 233.

Public Lands.—When public lands have been thrown open to private acquisition, one who complies with all the requisites to entitle him to a patent for any particular tract is regarded as the equitable owner thereof: See the monographic note to *Schneider v. Hutchinson*, 76 Am. St. Rep. 480. Consult, also, *Phillips v. Carter*, 135 Cal. 604, 87 Am. St. Rep. 152, 67 Pac. 1031; *State v. Bridges*, 22 Wash. 64, 79 Am. St. Rep. 914, 60 Pac. 60; *Wittenbrock v. Wheadon*, 123 Cal. 150, 79 Am. St. Rep. 32, 60 Pac. 664.

CALLIHAN v. WASHINGTON WATER POWER CO.

[27 Wash. 154, 67 Pac. 697.]

APPEAL—Fraud at Trial.—The supreme court, although all the testimony has been brought up, is not so good a judge of whether fraud was perpetrated at the trial as the court below, and its judgment will not be interfered with, an abuse of its discretion not appearing. (pp. 830, 831.)

EVIDENCE.—All Facts are Admissible in evidence which afford reasonable inferences, or throw any light upon the matter contested. (p. 832.)

EVIDENCE.—The Trip Report of a Street-car Conductor, showing the number of passengers on a certain trip and that they paid cash fares, is admissible in evidence against one who claims to have been a passenger, under a transfer slip, on that trip and negligently injured. (p. 840.)

Graves & Graves, for the appellants.

Stephens & Bunn, for the respondent.

¹⁵⁴ DUNBAR, J. Action for damages by the appellants, Lillian I. Callihan and C. C. Callihan, for personal injuries ¹⁵⁵ alleged to have been sustained by Lillian I. Callihan through respondent's negligence in operating one of its street-cars in the city of Spokane. A jury returned a verdict for the respondent. Appellants' motion for a new trial was denied, and from the judgment entered thereupon this appeal was taken.

The complaint alleges, in substance, that Lillian I. Callihan was a passenger on one of the street-cars of respondent in the city of Spokane, on the evening of April 28, 1900, and that, while attempting to alight from said car at the corner of Fifth and Hatch streets, the car was negligently started in an abrupt manner, throwing said plaintiff to the ground, by reason of which fall she sustained the injuries complained of. The substantial defense of the respondent is that the appellant, Lillian I. Callihan, was not a passenger on its car at the time of the alleged accident, and that, if she received any injuries at that time, it was not through any fault or agency of the company, but by reason of her own mishap or misfortune. There is undisputed testimony of the fact that the car stopped at Fifth and Hatch streets to let off a passenger by the name of Chandler. It then proceeded several blocks to the end of the line, and, upon returning to Fifth and Hatch streets, the motorman, Spear, saw Mrs. Callihan lying in the road by the side of the car line. He and the passengers alighted from the car, ex-

amined the woman, and thought that she was either dead or dying. They then got on the car, traveling two blocks, when Spear, the conductor in charge, stopped the car, went into a doctor's office near by, and telephoned what he had seen to the police station. On his return to the car from the doctor's office he met a Mr. Koontz, told him what had occurred, and asked him to go down and see to the woman. ¹⁵⁶ Mr. Koontz immediately repaired to where the woman was lying, found her attempting to get up from the ground, and assisted her to arise, when the east-bound car came along and stopped, the motor-man got off, and he and Mr. Koontz got her into a seat on the car. Mr. Callihan, the husband of the woman, came to the door of his house with a lamp, when he heard the car coming, went down to see what had occurred—his wife not coming in—and, with the assistance of Mr. Koontz, carried her to the house and got her into bed. A doctor was summoned and the patient was given necessary attention.

Error is alleged on the part of the court (1) in striking the interrogatories propounded by appellants to respondent; (2) in receiving, over appellants' objection, certain testimony; (3) in receiving in evidence, over appellants' objection, conductor Spear's trip report as to fares taken, etc.; and (4) in denying appellants' motion for a new trial. It is earnestly urged by the appellants that the court erred in denying the motion for a new trial; that the record in this case shows corruption on the part of the jury, and undue influence brought to bear on the jury, and fraud in the preparation and conduct of the defense. This was a bitterly contested case, the record showing that there was a great deal of partisan feeling exhibited in the trial of the cause on both sides; and much is said in the brief of the appellants in support of their contention that the motion for a new trial should have been granted. But from an examination of the voluminous record in this case, which comprises about one thousand pages, we are unable to conclude that this court would be justified in setting aside the verdict of the jury on the grounds urged. It is insisted by the appellants that this court would be as good a judge of whether fraud had been ¹⁵⁷ perpetrated as the court below, the testimony having all been brought here; but this is not exactly true. There is a certain atmosphere surrounding the trial of every cause, that the trial court is familiar with, which enables him to better construe the actions of witnesses and jurors than this court could; and, it not appearing that the court abused its discretion

in refusing the motion, its judgment will not be interfered with here.

Neither do we think that the court erred in striking the interrogatories propounded by the appellants to respondent, or that it erred in receiving the testimony objected to on pages 429 to 433 of the statement of facts.

There is, however, an assignment of error that has challenged the attention of this court, and has led to an extensive investigation of the law involved; that is, that the court erred in receiving in evidence, over the appellants' objection, the conductor's trip report as to fares taken, etc. According to Mrs. Callihan's testimony the car from which she claims to have been thrown must have been the east-bound car, leaving the end of the line—Nataatorium Park—at 8:55 o'clock, and Howard and Riverside at 9:15 o'clock, in charge of Spear, conductor. She says her fare was paid with a transfer slip from a north side line. Spear, being called by the respondent, testified, as a matter of independent recollection, that he had five passengers to the corner of Howard and Riverside; that three alighted there, and that their places were, within the next few blocks, taken by three others, thus making a total of eight for the trip; that all paid cash fares; and that no transfers were taken. By his identification of the five who were passengers from Howard and Riverside on he excludes Mrs. Callihan from the number. He then further testified that at the end of the line he ¹⁵⁸ made a written report, showing the number of passengers carried, and the fares paid—whether cash or transfer—and that this report was, in regular course and as was his custom, turned in to the company. This report was then offered in evidence, and, on objection, was rejected. The court afterward reconsidered his ruling and admitted it. The instrument purports to show the number of passengers carried by Spear on his respective trips on April 26th and the medium in which their fares were paid, and that on the trip in question he had eight passengers, all of whom paid cash fares. This is appellants' statement, and seems to be warranted by the record. It is conceded that the conductor in this instance would have a right to have examined the report for the purpose of refreshing his memory, but it is alleged that, having testified independently of the memorandum, the introduction of the memorandum was equivalent to the admission of declarations previously made, which would be self-serving in their nature. It is difficult to discover any sound reason for allowing the witness to refresh his memory

from a memorandum or writing, then testify to a fact furnished by the writing, but which he could not have testified to without the aid of the writing, and then exclude the writing which was the basis of the testimony. It would seem that, after all, the writing furnished the primary evidence in such a case. It is not gainsaid that the conductor could have testified from the report, and that the report could have been used in the presence of the jury for the very purpose of enabling the conductor to testify to the state of facts which the report itself showed when introduced. It is difficult to see how the introduction of the report could work a self-serving purpose greater than could be worked by it on its introduction for the purpose of refreshing the ¹⁵⁹ memory of the witness. The object of a legal investigation is the elicitation of the truth, and, to effectuate such object, all facts are admissible in evidence which afford reasonable inferences, or which throw any light upon the subject matter contested. No competent means of ascertaining the truth should be neglected—much less inhibited; and none are to be decreed incompetent unless such means have been shown by reason and experience to prevent or obscure the truth, instead of discovering it. What are the alleged objections to this testimony? That it is incompetent, irrelevant, immaterial, hearsay, and self-serving. The objections given to it at the trial were more restricted, but we will discuss them in their fullest scope. Its incompetency depends upon whether it is self-serving or not. That it is relevant and material is beyond question, and it is equally plain that it is not hearsay; for it is in reality the testimony of the witness himself, and not that of another person. Could it, under the circumstances of this case, be self-serving? It may be stated that the general rule is that the previous declarations of a witness out of court, and not sworn to, are not admissible to sustain his evidence given in court. The reason for this rule is that such declarations are or might be self-serving, and, as has frequently been said, make a witness' credibility depend more upon the number of times he had repeated the same story, than upon the truth of the story itself. Under such a system the honest, candid litigant would be at the mercy of a designing opponent who had industriously circulated a fabrication which he conceived it would be to his interest to swear to in court. But when the reason for the rule ceases, the rule itself cannot apply, and the testimony will be admitted under the general rule above quoted, or under what might be termed an exception ¹⁶⁰ to the rule. The testimony

objected to here was not a statement of a witness made previous to trial, but after the issues had been made up, and could not have been made for the ulterior purpose of strengthening testimony which he intended thereafter to offer; but it was the report of a private officer, which it was his duty, under the rules of the corporation which employed him, to make—rules which were in existence before the accident occurred, and had been regularly complied with. The rules themselves had no reference to the subject of this controversy. The compliance with the rules had no such reference, and the compliance with the rules in this particular instance could have had no such reference, for the report was made before there was any knowledge on the part of the witness that any accident had occurred; and, even if he had known of the accident, he could not possibly have surmised that the particular question in relation to transfers would be in issue in any cause which might arise. These circumstances clearly take the case out of the general rule, and render the testimony absolutely unobjectionable, so far as the charge of being self-serving is concerned; and, relieved of this objection, it seems to us that it is the very best testimony that could have been offered, tending to elicit the truth in regard to that particular point. That it is pertinent and convincing testimony is testified to by the earnest argument made by counsel for appellants to show that, if error, its admission is not error without prejudice. Indeed, so pertinent and convincing is this character of testimony in this particular case, that, if it had not been offered, the defendant might have felt that it was in danger of being subjected to a telling criticism before the jury for omitting to produce for its consideration convincing evidence resting peculiarly within its own ¹⁶¹ knowledge, the omission of which would raise the presumption, or at least a strong suspicion, that such evidence, if adduced, would operate to its prejudice. Many cases are cited by appellants in support of the inadmissibility of this testimony, but, with few exceptions, they go only to the general proposition announced above—that the previous declarations of a witness are inadmissible.

Insurance Co. v. Guardioli, 129 U. S. 642, 9 Sup. Ct. Rep. 425, holds that letters of a shipping agent to his principal are incompetent evidence, either in themselves, or in corroboration of the agent's testimony of the quality of the goods shipped, against third persons. It is evident that testimony of this kind

would fall under the objection of being self-serving, because it consisted of statements by the agents to their principals, all in the same interest, and all with reference to a transaction which they knew they were having with the purchasing parties. The same principle is involved in cases cited from this state. That is a different proposition entirely from the case at bar, where the report was made without reference to, and before there could have been any thought that such testimony would ever be called for in a court of law.

The case of *Nashville etc. Ry. Co. v. Parker*, 123 Ala. 683, 27 South. 323, is more nearly in point. There it was decided that records made by a witness were not admissible when the facts were proved by the witness himself from direct personal knowledge, and the records were not offered for the purpose of refreshing his memory. The case was an action against a carrier for injuries to a horse, and the witness attempted to testify that the seal on the car was not broken. Many cases of this class do hold that, where the witness testifies independently as to a state of facts, the memorandum cannot be introduced in support ¹⁶² of such testimony—a rule which we think, as before indicated, is illogical, and which is severely criticised by many of the best courts in the Union. Without especially reviewing the other cases cited by appellants, as a rule, they simply assert the general doctrine announced above.

This is the rule announced in appellants' citation from *Thompson on Trials*, section 571 et seq. But, under the head of "Recognized Exceptions to the Rule," section 574, Mr. Thompson says: "There are certain recognized exceptions to the foregoing rule, as to which all the authorities agree. Thus, where the witness is charged with testifying under the influence of some motive prompting him to make a false statement, it may be shown that he made similar statements at a time when the imputed motive did not exist, or when motives of interest would have induced him to make a different statement from that which he actually made."

The suggestion would naturally be made in this case that the conductor, who was an employé of the company, would be prompted to testify—at least, as far as he could conscientiously—in favor of his employers. The introduction of this testimony would show that he made the similar statement at a time when the imputed motive did not exist, for there was no motive to have made an erroneous report; at least, no motive connected with this cause. Another exception to the rule is that, if a wit-

ness be impeached by proof of his having previously made statements that were in contradiction of evidence tending to show that the witness' account of the transaction was a fabrication of a recent date, it may be shown that he gave a similar account, before its effect and operation could be foreseen. It must appear from the testimony in this case that the account given in the report would ¹⁶³ tend to show that the account given by the witness at the trial was not a fabrication of a recent date.

The case of *Robb v. Hackley*, cited by appellants from 23 Wend. 50, while holding that proof of declarations made by a witness out of court in corroboration of testimony given by him on the trial of a case is, as a general rule, inadmissible, notes the very exceptions which we have just discussed, and cites Phillips on Evidence, Cowen's edition, 308, where that author says that, in one point of view, a former statement by the witness appears to be admissible in confirmation of his evidence—that is, where the counsel on the other side impute a design to misrepresent from some motive of interest or relationship; that there, indeed, in order to repel such an imputation, it might be proper to show that the witness made a similar statement at a time when the supposed motive did not exist, or when motives of interest would have prompted him to make a different statement of the facts. The court adds: "It is agreed also by Mr. Starkie, that such evidence may, under special circumstances, be admitted; as, for instance, in contradiction of evidence tending to show that the account was a fabrication of late date, and where consequently it becomes material to show that the same account has been given before its ultimate effect and operation, arising from a change of circumstances, could have been foreseen"; quoting Evans in his notes to Pothier, where, after speaking of the admission of declarations of the witness on former occasions to confirm his statements in court, it is said: "In ordinary cases the evidence would be at least superfluous, for the assertions of a witness are to be regarded in general as true, until there is some particular reason for impeaching them as false; which reason may be repelled by circumstances showing that the motive upon ¹⁶⁴ which it is supposed to have been founded could not have had existence at the time when the previous relation was made, and which, therefore, repel the supposition of the fact related being an afterthought or fabrication. He adds, if a witness speaks to facts negating the existence of a contract, and insinuations are thrown out, that he has a near connection with the party on whose behalf he appears—that a

change of market, or any other alteration of circumstances, has excited an inducement to recede from a deliberate engagement; the proof by unsuspicious testimony that a similar account was given when the contract allged had every prospect of advantage, removes the imputation resulting from the opposite circumstance, and the testimony is placed upon the same level which it would have had if the motive for receding from a previous intention had never had existence."

In the case there under consideration the testimony was held to be inadmissible, but the testimony sought to be admitted was a letter which the witness had written to the plaintiffs, and the court said: "Independent of his own statement, there was no evidence that the letter was written when the transaction was recent, or that it had ever been in the hands of the plaintiffs. It may have been prepared with direct reference to this litigation. The case is not so strong as it would have been on proof by a third person that the witness had made similar declarations immediately after the business was transacted."

So that, of course, if the testimony might have been prepared with direct reference to the litigation, it would fall under the objection of being self-serving testimony, and was properly overruled.

In *Gates v. People*, 14 Ill. 433, the supreme court of Illinois held that the former declarations of a witness whose credibility was attacked could be given in evidence to corroborate his testimony. The particular case was ¹⁶⁵ this: The prisoner called witnesses to show that the character of Devol for truth and veracity was bad, and he proved that an indictment was then pending against Devol for being accessary after the fact to the murder of Liley. The court thereupon allowed the prosecution to prove by the sheriff that Devol, on coming out of the jail, and before seeing John Gates, gave the same account of the interview with the prisoner. This testimony was objected to as inadmissible. The court said: "There seems to be a conflict of authority upon the question whether the former declarations of a witness whose credibility is attacked may be given in evidence to corroborate his testimony. It will not be necessary in this case to determine which is the better general rule. The authorities all agree that the former statements of the witness may in some instances be introduced for the purpose of sustaining his testimony; as where he is charged with testifying under the influence of some motive prompting him to make a false statement, it may be shown that he made similar statements at a

time when the imputed motive did not exist, or when motives of interest would have induced him to make a different statement of facts. So in contradiction of evidence tending to show that the witness' account of the transaction was a fabrication of a recent date, it may be shown that he gave a similar account before its effect and operation could be foreseen."

In *Insurance Co. v. Weide*, 9 Wall. 677, the very objection is made that the testimony was inadmissible because there was independent testimony admitted. The court says: "As to the second question, the admissibility of the evidence received by the court. There can be no doubt but the day-books and ledger, the entries in which were testified to be correct by the persons who made them, were properly admitted. They would not have been evidence per se,¹⁶⁶ but with the testimony accompanying them all objections were removed."

In *Insurance Co. v. Weide*, 14 Wall. 375, the court said: "How far papers, not evidence per se, but proved to have been true statements of fact, at the time they were made, are admissible in connection with the testimony of a witness who made them, has been a frequent subject of inquiry, and it has many times been decided that they are to be received—and why should they not be? Quantities and values are retained in the memory with great difficulty. If, at the time when an entry of aggregate quantities or values was made, the witness knew it was correct, it is hard to see why it is not at least as reliable as is the memory of the witness."

In *Curtis v. Bradley*, 65 Conn. 99, 48 Am. St. Rep. 177, 31 Atl. 591, it was held that the written statement of relevant facts is admissible in evidence on the testimony of the witness that he knew when it was made that the facts were correctly stated therein, but that he cannot now remember them. In criticising the practise of allowing the memorandum to be testified from, but not to be admitted, the court in that case said: "All courts concur in holding that the witness may read the statement of such paper to the jury, and that the jury may draw the conclusion that the statement so read to them is a true statement of the facts, but some courts hold that the paper is not evidence. It seems to us to be pressing the use of a legal fiction too far for a court to permit the statement made by such paper to be read as evidence, while holding that the law forbids the admission as evidence of the paper which is the original and only proof of the statement admitted. In other words, it would seem as if, in admitting the paper to be so read, the court, of necessity, ad-

mitted the paper as evidence, and therefore, by the concurrent authority of all courts, the paper is itself ¹⁶⁷ admissible. . . . The paper is read by the witness, and the knowledge the witness once had of the facts stated by the paper is imputed to him as still existing, and the statement of the paper is received as the testimony of the witness, and the paper itself, the only witness capable of making the statement, is excluded. The use of such fiction in the administration of justice can rarely, if ever, be justified. It is certainly uncalled for in this instance. The principles of law invoked to justify the fiction are amply sufficient to support, indeed to demand, the admission of the document as evidence. As regards its admissibility as evidence, there is no substantial difference between this paper and any other tangible object capable of making a truthful and relevant statement."

The same might well be said of the report the admissibility of which is questioned by the appellants in this case. It is a circumstance throwing light on the mind of the jury on the question of whether or not any passenger traveling on the car on that trip had paid passage by transfer slip.

In *Dunlap v. Hopkins*, 95 Fed. 231, 37 C. C. A. 52, it was held that a letter written by a witness to a third person, containing a statement of a transaction to which the witness testified as having taken place on the day on which the letter was written and dated—the correctness of the date having been testified to by the witness—was admissible in evidence as a memorandum corroborating the testimony of the witness as to the date of the transaction. This case goes further than it is necessary to go to sustain the admission of the testimony in the case at bar.

In *Glaspie v. Keator*, 56 Fed. 203, 5 C. C. A. 474, where a book showing scale of timber was admitted, the court said: "We are of the opinion that under such circumstances either of the timber estimators might properly refer to the ¹⁶⁸ book for the purpose of refreshing his memory as to the opinion then formed, and to enable him to testify thereto, and that, in connection with his testimony, the book itself was properly admissible. But, even if we are wrong in this view, yet it appears to us that the admission of the book was in no wise prejudicial to the plaintiff in error. The witness who identified it had already given evidence as to its contents, and what it showed, which was not objected to. It had appeared in the course of his examination before the book was offered that it contained an entry showing that the total timber on Keator's land was three million six

hundred and ninety-two thousand feet, and the book, when offered, simply confirmed that statement, and had no tendency to show any further fact."

In *Owens v. State*, 67 Md. 307, 10 Atl. 210, the very question under discussion here—namely, that the report could not be introduced because the conductor had testified independently of it—is discussed, the court saying: "It has been urged in argument that the entry or memorandum can only be used where the witness has no present independent recollection of the transaction referred to. But its admissibility depends upon no such distinction. If the witness swears that he made the entry or memorandum in accordance with the truth of the matter, as he knew it to exist at the time of the occurrence, whether he retains a present recollection of the facts or not, the entry or memorandum is admissible; for though he may have a present recollection (of doubtful or varying degree of certainty, it may be), independently of the memorandum, the paper is admissible as means of verification or confirmation of what he states from memory. This is the clear logical deduction from the cases cited."

In *State v. Brady*, 100 Iowa, 191, 62 Am. St. Rep. 560, 69 N. W. 290, it was held that the daily record of the sale of tickets, kept in the office of a railroad station agent, as required by a rule of the company, and containing a record of all tickets sold, and the ¹⁰⁰ names of the stations to which sold, when properly authenticated, is admissible as evidence of the facts therein stated; and the court in that case quotes approvingly the criticism made in *Curtis v. Bradley*, 65 Conn. 99, 48 Am. St. Rep. 177, 31 Atl. 591, in relation to the practise by some of the courts of allowing the statement to be testified from, and then excluding it from evidence.

In *Donovan v. Boston etc. R. R. Co.*, 158 Mass. 450, 33 N. E. 583, in an action against a railroad company for injuries at a crossing, plaintiff's evidence was that he was injured near S. station at 5:02 P. M. by an incoming train, his view of which was obstructed by another train which was delivering passengers at the station. To show that no train was delivering passengers there at that time, defendant put in evidence, under objection, the entries on the telegraphic train report sheet kept in its train dispatcher's office at B., together with the testimony of the train dispatcher, that the entries of the time all trains pass the several stations en route were made from dispatches received by

him from the station operators. Held, that defendant's evidence was competent.

In *Bourda v. Jones*, 110 Wis. 52, 85 N. W. 671, it was held that certain inventories which had been made by the witness were properly received in evidence, when the witness testified that he knew the same were correctly made.

In *Diamant v. Colloty*, 66 N. J. L. 295, 49 Atl. 445, 808, it was held that where slips containing reports of work done, cost of same, and amount and kind of material used, are part of a method of carrying on business, they are competent evidence in offering books and accounts of business. As sustaining the doctrine of this testimony, see *St. Paul etc. Ins. Co. v. Gotthelf*, 35 Neb. 351, 53 N. W. 137.

¹⁷⁰ An attempt is made by the appellants in their reply brief to distinguish the cases cited by respondent, and to show that they are not consistent with each other; that sometimes the testimony is admitted on one theory, and sometimes on another. But whether the report in this case is admitted as a part of respondent's book of accounts as corroborative of Spear's testimony, or as a memorandum made in the regular course of business, it is admitted as a circumstance, and a strong and reasonable circumstance, which the jury had a right to consider, tending to show that on the night of the accident no passenger traveled on the alleged trip and car on a transfer slip. This was a pertinent issue in the case, and, under the circumstances, as it was not possible that such testimony could be self-serving, it was testimony which the defendant was entitled to, and was therefore properly admitted.

The whole cause having been submitted to the jury, and no error having been committed by the court, the judgment will be affirmed.

Fullerton, Anders, Hadley, Mount and White, JJ., concur.

Evidence.—The record of a railroad ticket office, showing the daily sales of tickets, is admissible in evidence, if the witness who identifies it knows that it was correct when made: *State v. Brady*, 100 Iowa, 191, 62 Am. St. Rep. 560, 69 N. W. 290.

**CEDAR CANYON CONSOLIDATED MINING COMPANY
v. YARWOOD.**

[27 Wash. 271, 67 Pac. 749.]

MINES—Extralateral Rights.—The holder of a mining location within which a vein apexes owns the whole of the vein, and may follow its dips and angles when it dips under and leads without the side lines of his claim as marked on the surface. (p. 846.)

COTENANCY IN MINES.—If a Cotenant in a Mining Claim purchases an interest in an adjoining claim for the benefit and protection of the common property, it inures to the benefit of the other tenants. (p. 847.)

COTENANCY IN MINES—Validity of the Location.—A mining location good as between the owners and the government, unless a third person can show a superior title, is property to which a cotenancy can attach. (pp. 847, 849.)

MINING CLAIMS.—The Fact that Mineral is not Discovered on a mining claim until after posting the notice of location and marking the boundaries is immaterial, in the absence of intervening rights; if the discovery is the result of subsequent work, the possessory rights are complete from the date of such discovery. (p. 848.)

A COTENANT IN A MINE Cannot Question the Common Title in a contest between him and his co-owners. (p. 849.)

COTENANCY IN MINES—Purchase and Contribution.—If a cotenant in a mining claim purchases an interest in an adjacent claim for the protection of the common property, his co-owners do not lose their right to participate therein by failing to contribute to the cost, when no demand has been made on them and they have been ready, since having notice, to pay their share of the price. (pp. 849, 851.)

IN A SUIT TO QUIET TITLE the Decree Should be Confined to the property and interests in issue. (p. 851.)

McBride & Folsom, for the plaintiff.

Merritt J. Gordon and Happy & Hindman, for the defendants.

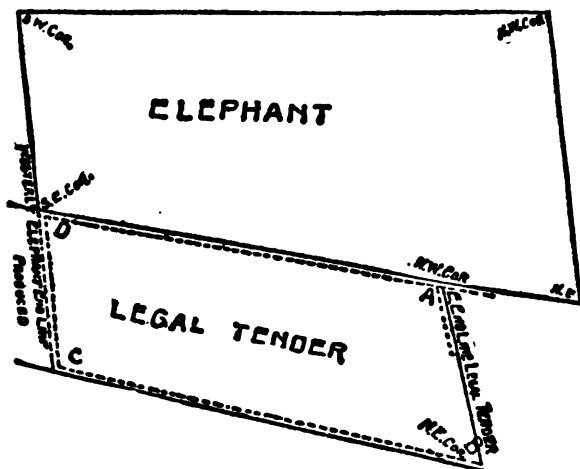
272 HADLEY, J. The plaintiff, the Cedar Canyon Consolidated Mining Company, a corporation, is the owner of a lode mining claim known as the "Elephant" claim, situated in Springdale mining district, in Stevens county, Washington. To the south and east of the Elephant, and adjoining it, is the Legal Tender mining claim, which was located by the defendant W. J. Yarwood. This location was made subsequently to the location of the Elephant claim. At the time of the commencement of this action the said defendant W. J. Yarwood and his codefendants Eli Yarwood, Ed. Yarwood and David Yarwood, were, and for some time prior thereto had been, the owners of

an undivided half interest in the Legal Tender claim, and the Deer Trail Consolidated Mining Company, a corporation, was the owner of the remaining undivided half interest therein. For a considerable time prior to the commencement of this action the Yarwoods and the last-named corporation were in joint possession of the Legal ²⁷³ Tender claim. Prior to the joint ownership and possession above mentioned the Yarwoods and the Deer Trail No. 2 Mining Company, a corporation, jointly owned and were in possession of the said claim, and while such joint ownership existed the last-named corporation became the grantor of the Deer Trail Consolidated Mining Company, and the latter succeeded to the ownership of said undivided half. During the period covered by the said respective joint ownership the owners were jointly engaged in mining ores from said claim, and shared the profits and divided the expenses connected therewith. The defendant W. J. Yarwood was the superintendent of such mining operations at the mines. These operations resulted in a profit approximating sixty thousand dollars. While the Deer Trail No. 2 Mining Company was the owner of said undivided half interest in the Legal Tender, and while it was jointly engaged with the Yarwoods in mining ore within the limits of the Legal Tender claim, that company, through its president and general manager, Charles Theis, purchased from divers parties an undivided four-sevenths interest in the Elephant claim. In October, 1899, and while the Deer Trail No. 2 company was jointly engaged with the Yarwoods in mining the Legal Tender claim, it entered into an agreement in writing with Hogan, Cole & Wolf, who were then the owners of the remaining three-sevenths of the Elephant claim, by the terms of which the plaintiff corporation was to be organized, and in the agreement it was provided that Hogan, Cole & Wolf should convey to plaintiff corporation, when organized, their said three-sevenths interest, and the Deer Trail No. 2 company was to cause the remaining four-sevenths of the Elephant to be conveyed to the plaintiff corporation. In consideration of said respective conveyances, the said Deer Trail No. 2 company was to have and receive four-sevenths ²⁷⁴ of the entire capital stock of the plaintiff company, and the said Hogan, Cole & Wolf were to have and receive the remaining three-sevenths of said capital stock. It was further provided in the agreement that the Deer Trail No. 2 company should have the right to name a majority of the trustees of the plaintiff corporation, and all of the officers thereof, except the secretary. In pursuance of said written agreement, the

plaintiff corporation was organized in the latter part of October, 1899, and, as such corporation, took and received title to the Elephant claim from said Deer Trail No. 2 Mining Company and from Hogan, Cole & Wolf, and thereafter caused the stock of the plaintiff company to be issued in accordance with the said agreement as above outlined. The action was brought in the superior court of Stevens county, but by stipulation was removed to Spokane county, and was tried by the superior court of Spokane county. The said Yarwoods, together with one C. C. May, and the said Deer Trail Consolidated Mining Company, were made defendants in the action. The plaintiff, by its complaint, seeks to recover damages to the extent of one hundred thousand dollars for ores extracted within the limits of the Legal Tender claim, upon the theory that the vein from which said ores were extracted apexes within the limits of the Elephant claim. The complaint also asks for an injunction to prevent further mining operations on the part of the defendants within the limits of the Legal Tender claim. The defendant the Deer Trail Consolidated Mining Company did not answer the complaint. The defendants Yarwood answered the complaint, and denied that the vein from which they and their cotenants extracted ores within the limits of the Legal Tender claim had or has its apex within the limits of the Elephant claim, and they also set up an equitable defense to the action, and by way of cross-complaint that ²⁷⁵ a cotenancy existed between them and the Deer Trail No. 2 Mining Company and the Deer Trail Consolidated Mining Company during the time said ore was being extracted, which cotenancy included both the joint ownership of said Legal Tender claim and the joint operation of the mine therein while said ores were being extracted. They also charged plaintiff with full knowledge of the existence of such cotenancy, and with full knowledge, at the time it purchased the interest in the Elephant claim from the cotenant of the Yarwoods, that such interest had been purchased by their cotenant at a time when the cotenancy existed. They therefore claim that plaintiff is estopped to maintain the action, and ask that their title to the undivided half interest in the Legal Tender may be quieted, and they be permitted to share in the four-sevenths interest in the Elephant, which was purchased by their cotenant, and that their title to one-half thereof, or a two-sevenths interest, be quieted. To said cross-complaint of the Yarwoods, the plaintiff company, and the codefendant Deer Trail Consolidated Mining Company made answer. It being the view of the trial court that the pleadings

raised both legal and equitable issues, when the case came on for trial the court proceeded to hear evidence upon the equitable issues, and, without making any findings or decision thereon, but reserving such decision as to the equitable issues, further proceeded to impanel a jury to try the question of trespass, which involved the identity of the vein from which the ores were extracted within the limits of the Legal Tender claim by the defendants Yarwood and their cotenants. The jury trial resulted in a verdict for the plaintiff. The Yarwoods moved for a new trial, and pending the hearing thereon the court made its findings and conclusions upon the equitable issues. After the findings and conclusions were ²⁷⁶ made, the Yarwoods moved the court to set aside the verdict upon the further ground that upon the findings and conclusions of the court as to the equitable issues the plaintiff was estopped to prosecute this action, and that no effect could be given to the verdict. This motion was also overruled. The plaintiff and the defendant, the Deer Trail Consolidated Mining Company, also each moved for a rehearing and new trial upon the equitable issues, which motions were each overruled. The court then proceeded to judgment and decree. The judgment recites the verdict of the jury, wherein they found that plaintiff was entitled to recover one dollar damages, and that it is entitled to the possession of the vein or lode outside of the side line of the Elephant claim and between the end lines extended through the Legal Tender claim to its southeast line. It is adjudged that the plaintiff is the owner of the lode or vein of the Elephant claim, said vein having its apex within the side lines of the Elephant claim, as determined by the verdict of the jury. It is further found that said vein passes out of the Elephant surface ground on its dip into and underneath the surface of the Legal Tender claim, and it is adjudged that plaintiff is entitled to recover from the defendants five-sevenths of all that portion of the vein which lies underneath the surface of the Legal Tender, and to the easterly of a plane drawn downward vertically through the westerly end line of the Elephant claim extended southerly in its own direction, and within planes drawn downward vertically through the easterly end line of the Legal Tender claim and the side lines of the same. The location of that portion of the vein of which plaintiff is adjudged to be entitled to recover from defendants an undivided five-sevenths is more particularly shown by the following diagram, which is a copy of the diagram attached to the

decree, and ²⁷⁷ marked "Exhibit A." The location of said portion of the vein is indicated on the diagram by the planes drawn downward vertically through the dotted lines "A—B," "B—C," "C—D," "D—A."



It is further adjudged that the defendants Yarwood are entitled to the remaining two-sevenths of that portion of the Elephant vein or lode lying underneath the Legal Tender surface and within the planes above described, but are not entitled to any other portion of the Elephant claim or lode. It is decreed that the title of the plaintiff be quieted to all of the Elephant claim and the lode apexing therein, excepting the part above described as belonging to the Yarwoods, and the defendants are perpetually enjoined from interfering with the possession of plaintiff.

²⁷⁸ From the decree of the court there are two appeals. The plaintiff appeals from that portion of the decree which determines that the defendants Yarwood are entitled to two-sevenths of the Elephant vein which lies within the limits of the Legal Tender claim, it being the contention of plaintiff that the Yarwoods are not entitled to any portion thereof. The defendants Yarwood have appealed because of the refusal of the court to find and decree that their title shall be quieted to a half interest in the Legal Tender claim, and also to one-half of four-sevenths of the Elephant claim, purchased by their cotenant. The plaintiff's appeal is prosecuted wholly on the judgment-roll and the facts as found by both the court and jury. No exceptions to

the findings are urged by the plaintiff, but it is insisted that they do not support that part of the judgment which decrees that the Yarwoods are entitled to two-sevenths of the Elephant lode lying beneath the surface of the Legal Tender claim. By the issues submitted to the jury they were called upon to determine by their verdict whether the vein upon which defendants had been operating within the limits of the Legal Tender has its apex within the limits of the Elephant. The verdict determined that the apex is within the Elephant claim. It is well settled that the holder of a valid mining location within which a vein or lode apexes is the owner of the whole of the vein, and he has the right to follow its dips and angles for the purpose of mining when it dips under and leads without the side lines of his claim as marked and located upon the surface. As a legal proposition, it is unnecessary to further discuss this question, since it is not controverted by the parties here. If, then, the plaintiff is the owner of the claim where the Elephant lode apexes, it is also the owner of that portion of the vein which lies within the limits of the Legal Tender, ²⁷⁹ and is entitled to the possession thereof, unless there be some equitable reason in favor of the Yarwoods why plaintiff is not entitled to the whole of it as against them. From the statement heretofore made it will be remembered that the Yarwoods, together with their cotenants, had for some years been mining from this vein within the limits of the Legal Tender claim. While the Elephant location was older than that of the Legal Tender in point of time yet it appears that much more work had been done in the way of developing and mining within the limits of the latter than within the former claim. We think the Yarwoods and their cotenants began and continued in good faith to operate upon the vein in question, believing it to belong to the Legal Tender claim. Later developments upon the Elephant claim, however, satisfied its owners that the vein upon which the Yarwoods and their cotenants were operating was the same vein that apexed within the Elephant, and thereupon such claim was asserted. The cotenancy had been operating for some years with profitable results, and when this adverse claim to the ore they were mining was asserted they feared an interference by way of a suit demanding an accounting or otherwise. Based upon this fear of interference, Charles Theis, as president of the Deer Trail company, a cotenant and mining partner of the Yarwoods, purchased for his company the four-sevenths interest in the Elephant, as hereto-

fore stated. Concerning this purchase Mr. Theis testified as follows:

"Q. You bought it in order to secure them against the probabilities of a lawsuit? A. Yes, sir. It had no ore of any kind in sight—of any kind that I could find. . . . At the time the purchase was made it was made solely for the purpose of preventing this litigation. . . . Q. And it was for the purpose of protecting ²⁸⁰ your Legal Tender interest that you made that investment in the Elephant? A. Yes, sir. . . . Q. Well, you made the investment with the expectation of turning it over to your company? A. Yes, sir. Q. And for the purpose of protecting the company in its Legal Tender investment? A. Yes, sir. Q. That was the purpose, too, for which you acquired the additional interest? A. Yes, sir. Q. The same purpose? Had the same thing in view that you had in view when you acquired the May interest? A. Yes, sir. Q. Namely, to protect the Legal Tender property? A. To protect our interest in the Legal Tender property."

It seems clear, therefore, that the purchase was not made primarily as an independent investment in the Elephant, but for the sole purpose of protecting the operations of the Deer Trail company and the Yarwoods within the Legal Tender claim from being interrupted by the owners of the Elephant. The Yarwoods contend that the relation of cotenancy which existed between them and the Deer Trail No. 2 Mining Company was such that any interest in the Elephant claim purchased by said company inures to the joint benefit of the Yarwoods and their cotenants in the Legal Tender. Such is the general rule in relation to purchases made by a tenant in common when made for the benefit and protection of the common property: *Franklin Min. Co. v. O'Brien*, 22 Colo. 129, 55 Am. St. Rep. 118, 43 Pac. 1016; *Mills v. Hart*, 24 Colo. 505, 65 Am. St. Rep. 241, 52 Pac. 680; *Turner v. Sawyer*, 150 U. S. 578, 14 Sup. Ct. Rep. 192; *Cecil v. Clark*, 44 W. Va. 659, 30 S. E. 216; *Montague v. Selb*, 106 Ill. 49; *Bracken v. Cooper*, 80 Ill. 221; *Boyd v. Boyd*, 176 Ill. 40, 68 Am. St. Rep. 169, 51 N. E. 782. Plaintiff contends that in legal contemplation no cotenancy existed here, because there was no valid mineral claim to which a cotenancy could attach; that the ²⁸¹ vein upon which the Yarwoods and their cotenants were working belonged to the Elephant, and they were therefore simply joint trespassers. It is urged that the purchase of the interest in the Elephant was that of a distinct and independent property, which bore no relation to any

common property to which the so-called cotenants had any lawful claim. It is asserted that no discovery of mineral was made within the Legal Tender at the time the location thereof was made. It appears from the evidence, however, that valuable mineral was at some time discovered within the Legal Tender, and the location being properly marked and location notices being posted and recorded, the claim became, as between the Yarwoods and their co-owners, a valid location. As between themselves and the government, they had title to the property, and were entitled to hold it until some one other than the government could show a better or paramount title. In the absence of intervening rights, the fact that mineral is not discovered on a claim until after the notice of location is posted and the boundary marked is immaterial, and, where the discovery is the result of work subsequently done by the locator, his possessory rights under his location are complete from the date of such discovery: *Nevada Sierra Oil Co. v. Home Oil Co.*, 98 Fed. 673; *Erwin v. Perego*, 93 Fed. 608, 35 C. C. A. 482; *Jupiter Min. Co. v. Bodie Consol. Min. Co.*, 11 Fed. 666; 1 *Lindley on Mines*, sec. 335, and cases cited. It follows that the Yarwoods and their co-owners had perfected a valid mining location, which was good as between themselves and the government, unless a third person could show a superior title. It was for the purpose of controlling such superior title in the interest of their common property that the purchase of the interest in the Elephant was made. The common title was assailed. It was believed that another had a better title, ²⁸² and one of the holders of the common title purchased an outstanding interest in such superior title. Under such circumstances we believe there was a tangible substance to which a cotenancy would attach, and that the parties sustained to each other the relation of cotenants. A cotenant will not be permitted to question the common title upon a contest between him and his cotenants: *Bornheimer v. Baldwin*, 42 Cal. 27; *Olney v. Sawyer*, 54 Cal. 376; *Freeman on Cotenancy*, 2d ed., sec. 152. When the Deer Trail Mining Company No. 2 purchased an interest in the Elephant claim, it was not in a position to question the common title of the Legal Tender, and, since the plaintiff company is the successor as grantee of the interest so purchased, it is not in position to assail the common title as a basis for establishing its own right of recovery. It must recover upon the strength of its own title, and we therefore think it is estopped to claim that there was no valid location made on the Legal Tender claim.

Plaintiff urges that it is not bound by the knowledge which some of its incorporators may have had as to the rights of the Yarwoods in the Elephant. The trial court, however, made the following record: "That the Cedar Canyon Consolidated Mining Company in this action had notice of the cotenancy existing between the Yarwoods and the Deer Trail No. 2 Mining Company, and succeeded to the interests of the Deer Trail No. 2 Mining Company in and to the Elephant claim with full knowledge of said cotenancy and of the rights of the Yarwoods thereunder." Plaintiff did not except to the above, and it must be held that it had full notice of the rights of the Yarwoods.

It is further urged by plaintiff that, even if a cotenancy did exist, the Yarwoods have lost their right to participate in the purchase by failure to offer to contribute ²⁸³ their proportion of the purchase price within a reasonable time. The four-sevenths interest in the Elephant was acquired at different times, and from different people, but was all acquired while the purchasing company and the Yarwoods were jointly working the deposits within the Legal Tender claim. When Mr. Theis, the president of the purchasing company, advised W. J. Yarwood of the purchase of the first one-fourth interest, Yarwood said to him that at the price paid he "would like to be in on it." Pending this time and the time the other purchases were made, Yarwood was working at the mine and the parties continued to share the profits of their joint enterprise. After the other purchases had been made, and when Yarwood was in the office of Theis in Spokane, he was informed of the other purchases, this being the first time the Yarwoods had known of the other purchases. Yarwood then claimed that the Yarwoods were entitled to a share in the interest purchased. Not until that time had the Yarwoods learned that it was the intention of the purchasing cotenant to assert an exclusive right to the interest purchased. There was some testimony to the effect that there were joint funds on hand, which it was supposed would be applied to the purchase of the first one-fourth interest, of which purchase the Yarwoods had learned; but, however that may have been, no request or demand was ever made by the cotenant of the Yarwoods that they should contribute to the purchase price, and they had never refused to contribute.

"But before a cotenant will be considered to have forfeited his right to participation by his delay, it must appear that he had notice not only of the purchase of the outstanding title

by his cotenant, but also of the exclusive claim set up by the latter. He may reasonably presume that the purchase was made in support of the common title,²⁸⁴ and may act upon that presumption, considering the outlay simply as a joint charge to be settled and accounted for as any other necessary expense incurred in protecting the joint estate. The burden is upon the purchasing tenant to show that his cotenant had notice of the purchase and of the exclusive claim set up by him": 17 Am. & Eng. Ency. of Law, 2d ed., 679, 680.

"We concede the correctness of the doctrine announced in *Mandeville v. Solomon*, 39 Cal. 133, and the cases cited therein, that where one tenant in common purchases an outstanding title for the benefit of his cotenants, the latter must, within a reasonable time, contribute or offer to contribute, their proportion of the purchase money. But that principle applies to cases only where the purchasing cotenant wishes to be paid, and conducts himself accordingly": *Boskowitz v. Davis*, 12 Nev. 446, 468.

"A tenant in common holds a several interest in the lands, which is so far identical with his cotenants' interest that, in all matters affecting the estate, he will be regarded as acting for them as well as himself. He cannot, therefore, purchase an outstanding adverse title and set it up against his cotenants, if they are willing to reimburse him pro rata for the money by him so expended. He will be regarded as holding the title he thus acquires in trust for his cotenants until the presumption is repelled by their refusal to contribute in payment of his outlays": *Weare v. Van Meter*, 42 Iowa, 128, 20 Am. Rep. 616, 617.

Upon this subject of willingness and readiness to contribute the court found as follows: "That the defendants Yarwood have at all times since receiving knowledge of the purchase by the Deer Trail No. 2 Mining Company of said four-sevenths interest in the Elephant claim been willing, and now are willing and ready, to contribute their proportion—namely, one-half of the expense and cost of the purchase price of said four-sevenths interest—but that the said Deer Trail No. 2 Mining Company have heretofore and now refuse to permit²⁸⁵ said defendants Yarwood to participate in the benefits arising from the purchase of said four-sevenths interest."

In view of the above finding, and of the evidence as discussed above, we think the Yarwoods did not waive their right to avail themselves of the benefit of the Elephant purchase. Upon pay-

ment of one-half of the purchase price and legal interest thereon, either by an accounting between themselves and their cotenants or otherwise, they are entitled to one-half of the interest purchased—that is to say, one-half of four-sevenths, or two-sevenths, of the entire Elephant lode, whether lying within the limits of the Legal Tender or of the Elephant—and, upon such payment being made, their title thereto shall be quieted. It must be taken as settled by the verdict of the jury that the particular vein of ore upon which the cotenants had been operating within the limits of the Legal Tender is a part of the Elephant lode. That vein of ore is the one real subject of controversy in this action, the purpose of the action under the various issues being to establish the respective rights of the parties therein.

The defendants Yarwood ask that their title may be quieted to a one-half interest in the Legal Tender claim, but, as we conceive the issues, this action in no way assails the Legal Tender claim, except in so far as the Elephant lode, which lies therein, is concerned. If other ore deposits have been discovered to exist within the limits of the Legal Tender, the right of the Legal Tender holders therein is not here in issue. There is, therefore, no occasion for any decree upon that subject. The decree should, therefore, be confined to the quieting of the title and to the establishment of the respective rights of possession in and to the entire Elephant lode, the respective interests being five-sevenths to the plaintiff company and two-sevenths to the defendants Yarwood.

²⁸⁶ The cause is remanded, with instructions to the trial court to modify the decree in accordance with this opinion.

Reavis, C. J., and Fullerton, White, Dunbar, Mount and Anders, JJ., concur.

COTENANTS IN MINES.

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X. Actions Between Cotenants and Third Persons.

I. What Constitutes Cotenancy in Mines.

a. **In General.**—In the manner and essentials of its creation, a cotenancy in mines is not different from a cotenancy in any other form of real property. A conveyance to two or more persons, which in other cases would make them tenants in common or joint tenants of the property conveyed, has the same effect when the subject of the conveyance is a mine or mining claim. Thus, a grant to several persons in certain proportions of the oil in a piece of land for a period of ninety-nine years makes the grantees tenants in common: *Bronson v. Lane*, 91 Pa. St. 153; and on the death of one tenant in common of a mine his heirs take his place in the cotenancy and become tenants in common with the owners of the remaining interests: *Holbrooke v. Harrington* (Cal.), 36 Pac. 365; *Gillett v. Gaffney*, 3 Colo. 351.

b. **Right to Share in Proceeds.**—A mere right to share in the proceeds of a mine does not, however, make the person so entitled a cotenant in the mine itself; it may create a cotenancy in the products of the mine when taken out: *Hudepohl v. Liberty Hill Con. Min. etc. Co.*, 80 Cal. 553, 22 Pac. 339. In *Reagan v. McKibben*, 11 S. Dak. 270, 76 N. W. 943, one of the owners of a mine conveyed his interest to a party, the latter agreeing to take personal charge of the mining property and to pay the grantor one-half of the proceeds arising from working the mines and one-half of the amount received on a sale of the property. The grantor, it was held, retained no interest, legal or equitable, in the property, and was not a tenant in common with his grantee or with the other owners of the mine.

c. **Separate Ownership of Surface and Mineral.**—Not infrequently the surface of a piece of land is owned by one person, while the mineral lying under its surface is the property of another. In such a case, however, the parties are not tenants in common, but the owners of separate and distinct interests in one piece of land. Each may have a fee or less estate in his respective part, but the rights of each are several and inhere in different portions of the property. The relation between the parties holding such interests is well expressed in *Virginia Coal etc. Co. v. Kelly*, 93 Va. 332, 24 S. E. 1020, a case in which the plaintiff held title to the minerals and timber and the defendant owned the surface of the same tract of land. "They became," says Biely, J., delivering the opinion of the court, "the owners of estates in fee in distinct and separate parts of the land; as much so as if they had acquired title to separate portions of a certain parcel of land. 'The division was as complete as if it had been made by lines on the surface.' Their respective estates were the subjects of independent taxation. . . . They were not the owners of undivided interests in the same subject, . . . but were the owners of distinct subjects of entirely different natures. They did not own interests or shares in the same freehold, but owned

separate freeholds which were separately the subjects of possession, enjoyment and encumbrance. Title to the freehold of the one, either in the surface or in the minerals, could not be acquired by adverse possession of the other. . . . The Virginia Coal and Iron Company alone owned the minerals and timber; Kelly alone owned the surface. There was no community of interest between them. Hence, it has been held that the owner of the surface of a parcel of land and the owner of the minerals under the same are not joint tenants, nor tenants in common." To the same effect are *Smith v. Cooley*, 65 Cal. 46, 2 Pac. 880; *Ames v. Ames*, 160 Ill. 599, 43 N. E. 592; *Adams v. Briggs Iron Co.*, 7 Cush. 361; *Neill v. Lacy*, 110 Pa. St. 294, 1 Atl. 325; *Powell v. Lantzy*, 173 Pa. St. 543, 34 Atl. 450, affirming 16 Pa. Co. Ct. Rep. 417. See, generally, in this connection the monographic note to *Lillibridge v. Lackawanna Coal Co.*, 24 Am. St. Rep. 554, 557.

d. Location in Names of Several.

1. **General Rule.**—A cotenancy in mines may, as has been said, be created in the same way as a cotenancy in other real property. Most frequently, however, such cotenancies are created by the participation of several persons in the "location" of a mining claim, a method of acquiring property peculiar to the species of property now under consideration. Where several thus join in the location of a claim, they are tenants in common of the mining rights and property thus acquired: *Chase v. Savage Min. Co.*, 2 Nev. 9.

2. **Implied Agency to Locate for Absentees.**—It is not necessary in order that a cotenancy arise by virtue of a location by several parties that all be present in person. A mining claim may be located by an agent: *Gore v. McBrayer*, 18 Cal. 587; *Thompson v. Spray*, 72 Cal. 528, 14 Pac. 182; and where there is a local custom to that effect, it is not even necessary that the person in whose name the location is made have knowledge of its being made: *Morton v. Solambo etc. Co.*, 26 Cal. 534. Indeed, it seems that even in the absence of such a custom, assent of an absentee in whose name a location is made will be implied: *Rush v. French*, 1 Ariz. 99, 150, 25 Pac. 816; *Gore v. McBrayer*, 18 Cal. 582. Compare *Thompson v. Spray*, 72 Cal. 528, 14 Pac. 182. Once, however, an authority is established, whether presumed or shown by subsequent ratification, a location made in favor of several persons, though some be absent, constitutes the parties tenants in common, and no subsequent change of the names by the locator or any other persons without their assent can affect the cotenancy thus established: *Morton v. Solambo Con. Min. Co.*, 26 Cal. 527; *Thompson v. Spray*, 72 Cal. 528, 14 Pac. 182.

a. **Prospecting Agreements.**—A contract between several persons that all mines which may be bought or located by any one of their number shall be shared by all is an agreement to hold such mines when acquired as tenants in common: *Miller v. Butterfield*, 79 Cal.

62, 21 Pac. 543. Such a contract is not within the statute of frauds requiring an instrument in writing to create an interest in land: *Moritz v. Lavelle*, 77 Cal. 10, 11 Am. St. Rep. 229, 18 Pac. 803; *Murley v. Ennis*, 2 Colo. 300; *Hirbour v. Reeding*, 3 Mont. 15; *Eberle v. Carmichael*, 8 N. Mex. 169, 42 Pac. 95. If one of the parties to such an agreement while it remains in force locates a mine in his own name, he will be deemed to hold the legal title in trust for his associates, and a court of equity will, in proper cases, enforce the trust and compel a conveyance of the respective interests to which the several parties are entitled: *Moritz v. Lavelle*, 77 Cal. 10, 11 Am. St. Rep. 229, 18 Pac. 803; *Murley v. Ennis*, 2 Colo. 300; *Hirbour v. Reeding*, 3 Mont. 15; *Welland v. Huber*, 8 Nev. 203; *Eberle v. Carmichael*, 8 N. Mex. 169, 42 Pac. 95. See, also, *Delmonico v. Rondebush*, 2 McCrary, 18, 5 Fed. 165. For certain purposes the relation of tenants in common is deemed to exist even before the conveyances are actually made. Thus, in *Eberle v. Carmichael*, 8 N. Mex. 169, 42 Pac. 95, the names of three persons claiming to hold three claims in common did not appear on the location notice of each mine. It was held, nevertheless, that while the legal title to each claim was in the person named on the notice as the locator of that claim, the others had such an interest "as constituted, under the mining laws, a holding in common, to the extent, at least, of making work done [on one] for development of the three satisfy the law, if sufficient in quantity and value."

In order, however, that a location by one in his own name shall, under the provisions of such a contract, inure to the benefit of his associates and constitute them tenants in common with him, they must have performed their portion of the contract. If, for instance, they have agreed to furnish him supplies in consideration of his making locations for the joint benefit of all, and they have failed to do so, a location subsequently made in the name of the locator will not give them any interest, legal or equitable, in the property: *Murley v. Ennis*, 2 Colo. 300; and the same rule will apply where one of the parties to a contract for joint prospecting abandons the enterprise: *McLaughlin v. Thompson*, 2 Colo. App. 135, 29 Pac. 816; or a partnership for this purpose has for any reason been dissolved prior to the perfection of locations made under it: *Page v. Summers*, 70 Cal. 121, 12 Pac. 120. The agreement must, moreover, be sufficiently definite to enable a court of equity to enforce it. A contract by one person to give another "an interest" in a paying mine if the latter procured it for the promisor is too vague and indefinite to permit of its enforcement. "An interest," says Garoutte, J., "is a most indefinite term, for any fraction of a unit would satisfy it, and, consequently, the amount of estate to be conveyed is unknown to the court; and, being unknown to the court, no decree could possibly be made carrying title to it": *Berry v. Woodburn*, 107 Cal. 504, 40 Pac. 802.

In *Miller v. Butterfield*, 79 Cal. 62, 21 Pac. 543, the agreement was between three parties, and bound them to "share equally in any mine we may buy or find from this date," one of the contractors agreeing to offset his time against his board with the other two. The court held that as to mines discovered and located by that one, pending the agreement, all were to be tenants in common, but that as to mines bought, a condition necessarily implied was that each must contribute his proportion of the purchase money before becoming so entitled; and, in the absence of such contribution, they could require no conveyance of any share in such mines from the person buying.

f. **Partnership in Operation of Mine.**—A discussion of mining partnerships is not covered by the scope of this note, and will not be here undertaken. A mine may, of course, be made partnership property, nothing in its nature rendering this either impossible or impracticable: *Sawyer, J., in Duryea v. Burt*, 28 Cal. 569. Far more frequently however, a partnership relation, if it exists between co-owners of a mine, relates to the operation of the property rather than to its ownership. Such is the "mining partnership," as the phrase is most frequently and properly used. This relation of mining partners in the working of a mine is not only consistent with, but most frequently accompanies, a relation of tenants in common between them as to the mine itself. In the operation of the common property they may be members of a "mining partnership," clothed with the somewhat peculiar rights and liabilities attaching to such partners, while in the absence of some facts (such as a purchase of the mine with partnership funds, etc.), showing that the mine itself is made a part of the stock of the partnership, as to it they remain tenants in common, with the powers and duties incident to that relation: *Hughes v. Devlin*, 23 Cal. 501; *Dougherty v. Creary*, 30 Cal. 291, 89 Am. Dec. 116; *Manville v. Parks*, 7 Colo. 128, 2 Pac. 212; *Patrick v. Weston*, 22 Colo. 45, 43 Pac. 446 (distinguishing *Duryea v. Burt*, 28 Cal. 569); *Mallett v. Uncle Sam Gold etc. Min. Co.*, 1 Nev. 188, 90 Am. Dec. 484; *Grubbs' Appeal*, 66 Pa. St. 117; *Hartney v. Gosling* (Wyo.), 68 Pac. 1118. See, also, *Meagher v. Reed*, 14 Colo. 335, 24 Pac. 681. Whether in any case the partnership relation extends only to the operation of the mine, or covers its ownership as well, is a question dependent upon the facts of that particular case: *Sawyer, J., in Duryea v. Burt*, 28 Cal. 569. For an analogous principle in the ownership of vessels where part owners of ships, while partners in the employment of the common property, remain tenants in common of the vessel itself, see the monographic note to *Smith-Green Co. v. Bird*, 90 Am. St. Rep. 352.

g. **Whether Joint Tenancy or Tenancy in Common.**—The cotenancy created by the location of a mining claim is, as we have seen, a tenancy in common: *Supra*, I, d, 1. Ordinarily, in fact, the relation between co-owners of mines is that of tenants in common, rather than of joint tenants. This is due, however, not to any principle peculiar to the law of mines, but is governed by the principles of

cotenancy generally, and is, therefore, not a matter which need be here considered. See, however, in this connection, *Freeman on Cotenancy and Partition*, sec. 86, and *Gillett v. Gaffney*, 3 Colo. 351; *Boston Franklinite Co. v. Condit*, 19 N. J. Eq. 394.

II. Restraints Imposed by Relation Between.

a. *In General—Fiduciary Nature of Relation.*—"All the restraints imposed upon cotenants," it is said in *Freeman on Cotenancy and Partition*, section 151, "in regard to their dealing between one another in reference to the common property, are founded mainly, if not exclusively, upon the theory that so far as the common subject of ownership is concerned, they are each bound to defend the interest of the other; or if not to defend, at least not to make any direct or indirect assault upon such interest." With reference to this relation of mutual trust and confidence supposed by the law to exist between persons standing in the relation of cotenants, cotenancies in mines are in no wise different from the same relation in other property.

The mere relation of tenants in common is not, however, of such a fiduciary nature as to require of one cotenant purchasing the interest of another that he disclose all facts in his knowledge concerning the productive capacity of neighboring property: *Neill v. Shamburg*, 153 Pa. St. 263, 27 Atl. 992. Compare *Foster v. Weaver*, 118 Pa. St. 42, 4 Am. St. Rep. 573, 12 Atl. 313. Nor is one bound to disclose to his cotenants the fact that upon the sale of the property he is to receive a higher sum for his interest than the others, and the concealment of such fact does not entitle his co-owners to maintain an action for any portion of the additional sum received by him: *Harris v. Lloyd*, 11 Mont. 390, 28 Am. St. Rep. 475, 28 Pac. 736. Where two persons were part owners in a contract for the purchase of a mine, and one employs it without the consent of the other to purchase the mine for a third person, receiving from the latter an interest in the mine, the defrauded part owner is held entitled to share in the interest so received by his co-owner, in the proportion held by him in the original contract: *Delmonico v. Rondebush*, 2 McCrary, 18, 5 Fed. 165.

b. *One Cannot Assail Common Title.*—One of the well-established applications of this general principle is to be found in the rule that a cotenant will not be permitted to question the validity of the common title. As between themselves, each is estopped to deny the validity of the original location, or to assail the common source of title. Having entered under it, one cannot, as against his cotenant, be heard to assert its invalidity: *Sever v. Gregovich*, 16 Nev. 325; *Cedar Canyon Con. Min. Co. v. Yarwood* (principal case), 27 Wash. 271, ante, p. 841, 67 Pac. 749; *Union Con. S. Min. Co. v. Taylor*, 100 U. S. 37, 5 Mor. Min. Rep. 323.

c. Relocation by One Cotenant.

1. *Where He has Agreed to Perform All Assessment Work.*—Where one of several cotenants of a mining claim undertakes to do the

annual work required by law to hold the claim, and fails to do it, the right of a stranger to locate is not affected by the contract of the cotenants among themselves. "Title to the public mineral land is acquired and held by discovery, location and representation in the manner provided by law. Representation from year to year keeps alive the grant. If representation fails, the grant fails, and the ground is open to relocation and purchase. The terms of the law are absolute. There are no exceptions. If the representative work for the year is not performed, the ground located becomes again a part of the public domain. . . . Any co-owner or cotenant may represent the claim and compel those interested with him to bear their proportion of the expenses; but the claim must be represented and the agreement of a cotenant to bear his proportionate share of the expenses is not a representation, and does not relieve him from the consequences of a failure to represent": *Saunders v. Mackey*, 5 Mont. 523, 6 Pac. 361. To the same effect, see *Doherty v. Morris*, 11 Colo. 12, 16 Pac. 911; *Royston v. Miller*, 76 Fed. 50. In *Doherty v. Morris*, 11 Colo. 12, 16 Pac. 911, it was held that the tenant in common who had lost his interest in a claim by reason of the breach of a contract by his cotenant to do the necessary assessment work, could not, by action in support of an "adverse claim," establish an equitable title in the relocation. In such an action it was, moreover, held immaterial that the forfeiture had taken place by reason of a conspiracy between the cotenant of the adverse claimant and the stranger making the location. It is to be noted in this connection, however, that the suit was an adverse claim, and, the claim having been forfeited, the element of collusion was immaterial. The court intimates, however, that the defrauded cotenant might, perhaps, have an equitable title in the new location, but this could not be taken advantage of in an action to declare such new location invalid, though it might be protected in an independent, appropriate proceeding.

Where the relocation is not by a stranger, but by the cotenant through whose default the claim has been lost, to allow him to gain title thereby as against his cotenants would be to enable him to take advantage of his own wrong. This the courts have very properly refused to permit, and, while a relocation by him is, it seems, valid (*Saunders v. Mackey*, 5 Mont. 523, 6 Pac. 361), he holds the title so acquired in trust for his cotenants in the proportion of the shares formerly held by them: *Royston v. Miller*, 76 Fed. 50. In his work on the Law of Mines, Mr. Lindley seems to regard *Saunders v. Mackey*, 5 Mont. 523, 6 Pac. 361, as opposed to the general rule that the acquisition of an outstanding title to the joint estate by one tenant in common inures to the benefit of all: 1 Lindley on Mines, sec. 406. What the case does decide is, that a relocation of a claim by a tenant in common, whose default in the performance of a contract between himself and cotenants that he do the necessary assessment work has thrown the claim open to relocation, is a valid relocation. The court, however, recognized the rule as to the acquisition of

an outstanding title by a cotenant, by stating that if the relations between the parties were such as to make the relocater a trustee in the location of the claim, a proper action would so declare him, and protect his cotenants' interest therein.

2. **Under Express Trust to Hold Title for All**.—Where several tenants in common of a mining claim find themselves unable to do the assessment work, and agree that one shall relocate for all, the cotenant so locating holds the title acquired by relocation in trust for all: *Hunt v. Patchin*, 13 Saw. 304, 35 Fed. 816. In the case cited, the person relocating was, in addition to being a cotenant, intrusted with the management of the property. As such, the court held, he stood in a confidential relation to his associates. "By conferring with them, and arranging to forfeit and relocate for the benefit of all, he misled them, and violated the confidence reposed in him, if he relocated clandestinely for the benefit of himself alone. By his act and this breach of faith, he threw his associates off their guard, and prevented them from taking other means to protect their interests."

In *Hallaack v. Traber*, 23 Colo. 14, 46 Pac. 110, the circumstances were somewhat similar. The several tenants in common there deeded their interests to one of their number to enable him to obtain a patent in his own name for the benefit of all the owners. While so acting, he filed an amended or additional location certificate, taking in additional territory, and afterward obtained a patent to the claim as described in the additional or amended certificate. The court held that the title to the additional territory so acquired was burdened with a trust in favor of his cotenants. "He took advantage of the title held in common by himself and his cotenants, and the common expenditure made by all for the purpose of securing additional territory." Had his position been one of tenant in common alone, the court points out, his relocation would, undoubtedly, have inured to the benefit of all. To permit him to hold it for himself alone, because by reason of his trusteeship he had been enabled to file an additional location certificate for the entire property, would be to allow him to reap an advantage from the trust property and from his position as trustee.

3. **General Rule**.—In the cases considered above, the relations of trust and confidence between cotenants have been strengthened by extrinsic circumstances. The relation is, however, sufficient in itself to charge with a trust for all of the co-owners any relocation of the common property by one of their number. Until the claim is appropriated by a stranger, forfeiture for failure to do the annual work is not complete. Until such appropriation the parties remain tenants in common, and a location by one of them in his own name is the simple case of one tenant in common acquiring an independent title to the common property. Such title, by a well-established rule, inures to the benefit of all: *McCarthy v. Speed*, 11 S. Dak. 362, 77 N. W.

590, 12 S. Dak. 7, 80 N. W. 135. See, also, *Coleman v. Clements*, 23 Cal. 245; *Strang v. Ryan*, 46 Cal. 33; *Sevor v. Gregovich*, 16 Nev. 325. See, also, in this general connection, *Hulst v. Doerstler*, 11 S. Dak. 14, 75 N. W. 270. Where the relocation or renewal is by a stranger to the first location, the fact that he associates with him in the relocation a number of those who were cotenants in the forfeited location does not, however, make the relocation inure to the benefit of those cotenants in the first location who were omitted in the second: *Strang v. Ryan*, 46 Cal. 33.

In certain California cases, it appeared that after the filing of a notice of location in the names of certain persons, the names of some of them were struck out, and those of others entered: See *Morton v. Solambo etc. Min. Co.*, 26 Cal. 527; *Thompson v. Spray*, 72 Cal. 528, 14 Pac. 182. This change, it was held, did not, and could not, affect the rights of those originally named as locators. These cases have been at times cited as applying the principle that a relocation by one cotenant inures to the benefit of all, but are, in fact, applications of a quite different principle, involve no question of relocation or of the confidential relation of cotenants, and are merely applications of the rule that a locator has a vested right which, until it is forfeited or abandoned, cannot be disposed of or otherwise affected by a cotenant or any other person.

d. Acquisition of Outstanding Title by One Cotenant.

1. **General Rule.**—The acquisition by one tenant in common of title to the common property by relocation after failure by all to do the annual assessment work, is a method of acquisition peculiar to mining property, and has, therefore, been separately considered. The principle that tenants in common of mining property hold a distinct title acquired by them in trust for their cotenants is by no means restricted to titles acquired by relocation. It extends to outstanding and distinct titles to the joint estate, however acquired. "The principle arises from the privity subsisting between parties having a common possession of the same land, and a common interest in the safety of the possession of each, and it only inculcates that good faith which seems appropriate to their relative position." Whatever the nature of the outstanding title, therefore, the rule applicable to other species of property is applicable in its generality to mining property held in common, and the purchase by one cotenant of any distinct, outstanding title inures to the benefit of all his cotenants who may desire to share therein: *Franklin Min. Co. v. O'Brien*, 22 Colo. 129, 55 Am. St. Rep. 118, 43 Pac. 1016; *Mills v. Hart*, 24 Colo. 505, 65 Am. St. Rep. 244, 52 Pac. 680; *Harris v. Lloyd*, 11 Mont. 390, 28 Am. St. Rep. 475, 28 Pac. 736; *Brundy v. Mayfield*, 15 Mont. 201, 38 Pac. 1067; *McCarthy v. Speed*, 11 S. Dak. 362, 77 N. W. 590, 12 S. Dak. 7, 80 N. W. 175; *Cecil v. Clark*, 44 W. Va. 659, 30 S. E. 216; *Bissell v. Foss*, 114 U. S. 252, 5 Sup. Ct. Rep. 851; *Turner v. Sawyer*, 150 U. S. 578, 14 Sup. Ct. Rep. 192.

2. **Purchase of Other Cotenant's Interest.**—This principle does not, however, affect the right of one cotenant to purchase the share of another without consulting the remaining associates. Such a purchase is not the acquisition of an outstanding title or encumbrance to the prejudice of the other tenants in common. The title purchased is in no sense antagonistic or hostile to the title of the remaining cotenants, nor does its purchase violate any relation of trust or confidence, although consummated after an understanding between one cotenant and the purchaser that the latter should negotiate for the terms on which the shares of a third cotenant might be secured: *Bissell v. Foss*, 114 U. S. 252, 5 Sup. Ct. Rep. 851, affirming *First Nat. Bank v. Bissell*, 2 McCrary, 73, 4 Fed. 694.

3. **Purchase of Senior Location.**—A senior conflicting location is not, strictly speaking, an outstanding title to a junior location, in which two persons are tenants in common. Each of the claims is in law a different thing from each of the others. The purchase of such senior location by one cotenant is, however, quite properly placed upon the same footing as the purchase of a lien or outstanding title in the common location. By any other rule, it is well said by the supreme court of Colorado, the right of the cotenant not permitted to share in the senior location would be as effectually extinguished as if the patent to the junior location itself were obtained with hostile intent by the tenant, and successfully asserted against his cotenant. "The reason for the application of the rule in the one case is as forcible as in the other, and to draw any such distinction as is here claimed with respect to cotenancy in mining claims would be to sacrifice substance for shadow, and enable gross wrongs to be perpetrated, contrary to the principle which gives life to the rule": *Franklin Min. Co. v. O'Brien*, 22 Colo. 129, 55 Am. St. Rep. 118, 43 Pac. 1016.

4. **Between Whom Rule as to Acquisition of Outstanding Title by One Cotenant Applies.**

A. **Where no Cotenancy Exists at Time of Purchase.**—In the application of the doctrine that an outstanding title purchased by one cotenant inures to the benefit of all, the courts have had regard to the reason and spirit of the rule, rather than its restricted application to those who are cotenants at the exact time of the purchase. The parties must, of course, be in a position such that the relation of confidence between cotenants would be violated by allowing the purchaser to retain title in himself. Thus the principle is not applicable where a cotenancy has ceased to exist as by an oral partition: *Four Hundred and Twenty Min. Co. v. Bullion Min. Co.*, 3 Saw. 634, Fed. Cas. No. 4989; or where the parties are not properly cotenants at all, as where one owns the surface and another the mineral: *Powell v. Lantzy*, 173 Pa. St. 543, 34 Atl. 450, affirming 16 Pa. Co. Ct. Rep. 417; *Virginia Coal etc. Co. v. Kelly*, 93 Va. 332, 24 S. E. 1020. (See, also, *supra*, p. 854.) But the principle cannot be

evaded by a person severing his relations as cotenant on one day, and acquiring an outstanding or perfected title on the next: *Gillett v. Gaffney*, 3 Colo. 351 (townsite entry). So where an interest is acquired in accordance with a prior parol agreement, the relation of cotenancy is to be determined with reference to the date of the agreement, rather than that of the actual conveyances, and the effect of the purchase of the superior title by one of the number will be determined in accordance therewith: *Franklin Min. Co. v. O'Brien*, 22 Colo. 129, 55 Am. St. Rep. 118, 43 Pac. 1016.

B. Where Title was Derived from Different Grantors or at Different Times.—Whether the doctrine that one tenant in common cannot, by purchasing an outstanding or adverse title, enforce it against his cotenants, is applicable to cases where the cotenants hold by titles derived from different grantors or at different times by separate conveyances, is a question on which the authorities are in conflict: See *Franklin Min. Co. v. O'Brien*, 22 Colo. 129, 55 Am. St. Rep. 118, 43 Pac. 1016, and note to *Tenable v. Beauchamp*, 28 Am. Dec. 84; *Freeman on Cotenancy and Partition*, sec. 151. Whatever the true rule on principle, or the weight of authority generally, the result of the cases applying the rule to cotenants of mines is that, however the interests of the cotenants were acquired, whether by one instrument from the same grantor, or by several instruments, at various times, and from different grantors, one cotenant cannot employ against his associates a superior, adverse, outstanding title purchased by him without permitting such of them as elect to do so to share it with him: See *Franklin Min. Co. v. O'Brien*, 22 Colo. 129, 55 Am. St. Rep. 118, 43 Pac. 1019; *Cecil v. Clark*, 44 W. Va. 659, 30 S. E. 216; *Turner v. Sawyer*, 150 U. S. 578, 14 Sup. Ct. Rep. 192.

O. Where Purchaser Holds Adversely to His Cotenants.—The rule under consideration is, of course, founded on the relation of mutual trust and confidence, which the law assumes to exist between cotenants. This reason is, however, certainly absent where the tenants in common hold adversely to each other. Accordingly, it is said by Brannon, P., in *Cecil v. Clark*, 44 W. Va. 659, 30 S. E. 216: "I cannot see why tenants in common, deriving in separate ways, or where one has ousted another and brought home to him notice of adverse claim, or made actual entry under a deed claiming the whole, and thus become the enemy of the cotenant, and negatived all relation of trust and confidence, may not buy in an outstanding lien or title and take its benefit. The strength of this position will likely ultimately enforce it. But the general rule is that one tenant in common, joint tenant or coparcener cannot do so has so long been stated in a general way, that I cannot say that this exception is tenable."

In *Tabor v. Sullivan*, 12 Colo. 136, 20 Pac. 437, the exception stated in the above extract as correct on principle, but doubtful on authority, is applied. The cotenancy, if any, existing in that case, arose against the will of the person procuring the outstanding title. He had purchased what appeared to be a clear title to an entire claim,

and had never recognized those as cotenants who claimed to be such by virtue of a prior unrecorded deed signed by a part only of several co-owners. Under these circumstances, the court held that there had been no abuse of a confidence expressed or presumed, and the rule forbidding a cotenant from acquiring an outstanding title for his own exclusive benefit did not apply.

5. Necessity of Offer to Contribute Share of Cost.—Where one tenant in common of a mine purchases an outstanding title, he is not, upon the one hand, bound to share it with his cotenants, unless they share with the expenses incurred by him in its acquisition; nor, on the other hand, are the cotenants bound to participate in the benefits of the purchase. "The right of a cotenant to share in the benefit of a purchase of an outstanding claim is always dependent on his having, within a reasonable time, elected to bear his proportion of the expense necessarily incurred in the acquisition of the claim": Freeman on Cotenancy and Partition, sec. 156. To affect him by delay, it must, however, appear not only that he knew of the purchase, but also of the adverse claim under it: Cecil v. Clark, 44 W. Va. 659, 30 S. E. 216; nor will his right of participation be barred where it appears that no demand has ever been made upon him to contribute his share, and that, at all times, after learning of the purchase, he has been ready and willing to contribute his proportion of the purchase price: Cedar Canyon Con. Min. Co. v. Yarwood (principal case), 27 Wash. 271, ante, p. 341, 67 Pac. 749.

6. Rights of Bona Fide Purchaser from Tenant Holding Outstanding Title in Trust for Cotenants.—An outstanding title purchased by one cotenant is burdened with an equity to the extent that the purchaser holds it in trust for those of his cotenants who, within a reasonable time, may elect to participate in its benefits. A subsequent purchaser of such title, who takes it with notice of the facts, takes it subject, therefore, to the trust which was fastened on it in favor of the cotenants of his grantor: Mills v. Hart, 24 Colo. 505, 65 Am. St. Rep. 244, 52 Pac. 680. And a corporation formed by persons having knowledge of the facts is held chargeable with notice of the trust attaching to the title, where such persons are the directors and only stockholders of the corporation, and it takes as grantee from them: Franklin Min. Co. v. O'Brien, 22 Colo. 129, 55 Am. St. Rep. 118, 43 Pac. 1016.

7. Patent Procured by One Cotenant.

A. General Rule.—In procuring a patent for a mining claim held in common by several persons, it is a frequent practice for them to appoint one of their number to take the necessary proceedings, and to receive the patent in his own name. Whether or not any such arrangements exist, one of several cotenants in a mining claim, taking a patent for the entire claim in his own name, holds it in trust for all the cotenants in the proportion of their respective shares. The procurement of a patent from the government for mineral land is

not, as it is pointed out in *Mills v. Hart*, 24 Colo. 505, 65 Am. St. Rep. 244, 52 Pac. 680, "the purchase of an outstanding, adverse title by a cotenant as that expression is ordinarily used; but, rather, the perfection of the common title." The same considerations of trust and confidence control, however (perhaps with greater force), as in the purchase of an adverse title by a cotenant, and the rule is undoubted that a patent obtained in the name of one cotenant inures to the benefit of all: *Costa v. Silva*, 127 Cal. 351, 59 Pac. 695; *Hallack v. Faber*, 23 Colo. 14, 46 Pac. 110; *Mills v. Hart*, 24 Colo. 505, 65 Am. St. Rep. 244, 52 Pac. 680; *Brundy v. Mayfield*, 15 Mont. 201, 38 Pac. 1067; *Mullins v. Butte Hardware Co.*, 25 Mont. 525, 87 Am. St. Rep. 430, 65 Pac. 1004; *Hunt v. Patchin*, 13 Saw. 304, 35 Fed. 816; *Turner v. Sawyer*, 150 U. S. 578, 14 Sup. Ct. Rep. 192. See, also, in this connection, *Gillett v. Gaffney*, 3 Colo. 351, where the owner of an undivided one-half interest in land subject to entry as a townsite perfected his title to his one-half interest only, and was held to be not bound to share it with his cotenant.

The rule is not, it seems, applicable where the cotenant procuring the patent held no relation of trust or confidence with his associates, but without recognizing their title, claimed the entire property adversely to them: *Tabor v. Sullivan*, 12 Colo. 136, 20 Pac. 437. See, also, *supra*, II, d, 4, a.

B. Under Agreement Between Cotenants to Hold Surface in Severalty.—In *Mullins v. Butte Hardware Co.*, 25 Mont. 525, 87 Am. St. Rep. 430, 65 Pac. 1004, several parties having settled upon certain lots of land, combined and appointed one of their number to procure a patent. Each party was to be entitled in severalty to the surface occupied by him, while all were to be tenants in common of the minerals. Each continued, in the meantime, to occupy and pay taxes on his portion of the surface, and, the patent having been secured, the patentee conveyed to each an undivided interest in the claim, without distinguishing the rights to the surface and in the mineral. Through several mesne conveyances, the plaintiff, Mullins, received title to one of the undivided interests so conveyed. The original cotenant, from whom plaintiff received his title, subsequently conveyed another undivided interest by a deed purporting to convey a separate surface right also. Through this latter deed the defendant claimed title. In a suit for partition of the claim, brought by plaintiff, it was held that the original patentee took the title, burdened with a trust to convey undivided interests in the mineral, and the separate portions of the surface occupied by each to the original settlers. These were, however, mere equities, and affected such subsequent purchasers only as took with notice, actual or constructive. The plaintiff did not have actual notice of the rights of the original locators to the several portions of the surface occupied by them, and their occupancy thereof, being quite consistent with a tenancy in common of the surface, as well of the mineral, did not charge him

with notice of their claim to separate surface rights. The record title showing merely a tenancy in common of the claim without any right to separate portions of the surface, the plaintiff took without notice of any claim to such rights, and was entitled to a partition of the claim, surface and mineral, as between tenants in common. The case is an interesting one, and is well considered.

C. Necessity of Cotenants "Adversing" Application by One for Patent.—In prescribing the procedure by which the locators of a mining claim may perfect their title and procure a patent from the federal government, provision is made for the filing of any "adverse claim": U. S. Rev. Stats. 2325, 2326. The land department of the United States holds that where one cotenant applies for a patent, his cotenants must protect their rights under the procedure provided for an adverse claimant: Monitor Lode, 18 Land Dec. 358; Lucy B. Hussey Lode, 5 Land Dec. 93. This means simply that any claims which a cotenant desires to urge in the land department against the issuance of the patent to the applicant must be urged in the mode provided.

The rights of a cotenant need not, however, be urged in the form of an adverse claim in the proceedings for a patent. The decision of the land office may result in the issuance of the patent to one of several cotenants, but the rights of his associates may be asserted in the ordinary courts. If proper, a trust in their favor will be fastened upon the legal title held by the patentee, and it is, undoubtedly, the general rule that co-owners need not "adverse" the application of one of their number for a patent in order to protect their vested rights in the property: *Mills v. Hart*, 24 Colo. 505, 65 Am. St. Rep. 244, 52 Pac. 680; *Brundy v. Mayfield*, 15 Mont. 201, 28 Pac. 1067; *Hunt v. Patchin*, 13 Saw. 304, 35 Fed. 816; *Turner v. Sawyer*, 150 U. S. 578, 14 Sup. Ct. Rep. 192. See, in this general connection, *Mattingly v. Lewisohn*, 8 Mont. 259, 19 Pac. 310.

In *Tabor v. Sullivan*, 12 Colo. 36, 20 Pac. 437, *Elliot, J.*, in a separate opinion, states that this rule is inapplicable to a case where the applicant for a patent holds in avowed hostility to his cotenants. "If the applicant had previously known or recognized them as co-owners, and especially if there was an understanding with the applicant that he should secure the patent for the benefit of all, a court of equity would, undoubtedly, protect the interests of the co-owners against an assertion of exclusive ownership by the patentee; but if these, and other like circumstances, calculated to inspire trust and confidence are altogether wanting, I see no reason why those claiming to be co-owners should passively suffer the patent to issue without asserting their rights." This qualification is indorsed by *Mr. Lindley* (*Lindley on Mines*, 728), but does not seem to have been generally adopted by the courts either in the statement or the application of the rule: See cases cited in preceding paragraph.

III. Possession of Common Property.

a. General Rule—Each Entitled to Possession of Whole.—The one distinctive feature of every cotenancy is the right of each tenant, in common with his cotenants, to the possession of the premises held in common. In mines, as in other property, each cotenant is entitled, equally with every other, to enter and take possession, and no one has any right to exclude an associate: *McCord v. Oakland Quicksilver Min. Co.*, 64 Cal. 134, 49 Am. Rep. 686, 27 Pac. 863; *Morganstern v. Thrift*, 66 Cal. 577, 6 Pac. 689; *Schreiber v. National Transit Co.*, 21 Pa. Co. Ct. Rep. 657.

b. By One Cotenant.

1. General Rule—Inures to Benefit of All.—An immediate and necessary corollary to this rule is the principle that the possession of one tenant in common is the possession of all. His sole occupancy of the common property is entirely consistent with the existence of the cotenancy and a full recognition of the rights of his cotenants to enter and share the possession with him at any time. In the absence, therefore, of facts showing that he holds possession of the premises in opposition to such rights in his cotenants, his occupancy will be presumed to be that of a tenant in common, recognizing the cotenancy: *Partridge v. McKinney*, 10 Cal. 181; *Waring v. Crow*, 11 Cal. 366; *Coleman v. Clements*, 23 Cal. 245; *Murley v. Ennis*, 2 Colo. 300; *Southmayd v. Southmayd*, 4 Mont. 100, 5 Pac. 318; *Mallett v. Uncle Sam Gold etc. Min. Co.*, 1 Nev. 188, 90 Am. Dec. 484; *Abernathie v. Consolidated Va. Min. Co.*, 16 Nev. 260; *Union Consolidated S. Min. Co. v. Taylor*, 100 U. S. 37, 5 Mor. Min. Rep. 323.

2. Where Adverse to Others.

A. General Rule.—This presumption is a rebuttable one, and the operation of the rule that the possession of one cotenant is the possession of all, ceases from the moment that such possession becomes adverse to the co-owners of the possessor. Once it appears that the party occupying the premises holds not in recognition of, but in hostility to, the rights of his cotenants, his possession ceases to amount to constructive possession by them, becomes adverse, and if maintained for the period provided for by the statute of limitations, will vest in the possessor a sole title by adverse possession to the premises: *Coleman v. Clements*, 23 Cal. 245; *Partridge v. McKinney*, 10 Cal. 181; *Huff v. McDonald*, 22 Ga. 131, 68 Am. Dec. 487; *Four Hundred and Twenty Min. Co. v. Bullion Min. Co.*, 9 Nev. 240, 1 Mor. Min. Rep. 114; *Abernathie v. Consolidated Va. Min. Co.*, 16 Nev. 260; *Susquehanna Ry. Co. v. Quick*, 61 Pa. St. 328; *Four Hundred and Twenty Min. Co. v. Bullion Min. Co.*, 3 Saw. 634, Fed. Cas. No. 4989.

B. What is Proof of Ouster and Adverse Holding.—To constitute an ouster of one tenant in common by another, the facts relied upon to show that the holding was adverse, must appear affirmatively: *Union Consolidated S. Min. Co. v. Taylor*, 100 U. S. 37, 5 Mor. Min. Rep. 323; and the hostility of the possession must have been unequivocally manifested: *Abernathie v. Consolidated Va. Min. Co.*, 16

Nev. 260. What constitutes an ouster in any particular case must be judged of by the facts of that case: *Susquehanna etc. Coal Co. v. Quick*, 61 Pa. St. 328. Mere "failure to recognize his cotenant" does not, it is held, show an ouster by one tenant in common: *Coleman v. Clements*, 23 Cal. 245. The adverse occupant need not give his cotenant actual notice that he is holding in hostility to him, nor need there be an actual ejection of the cotenant from the premises. When one claims the whole, and his possession is openly and notoriously adverse to his associates, this is sufficient to establish an ouster: *Abernathie v. Consolidated Va. Min. Co.*, 16 Nev. 260. Compare *Huff v. McDonald*, 22 Ga. 131, 68 Am. Dec. 487. Threats of bodily injury to a cotenant if he enters may be sufficient to show an ouster: *Paul v. Cragmaz*, 25 Nev. 295, 59 Pac. 857, 60 Pac. 983. The mere reception of a deed for the whole claim from a cotenant, or another person, where it is not followed by an entry, is not sufficient to prove an ouster and adverse possession: *Cecil v. Clark*, 44 W. Va. 659, 33 S. E. 216; but where one enters, claiming the whole estate, the entry is adverse to the other tenants: *Abernathie v. Consolidated Va. Min. Co.*, 16 Nev. 260. The receipt of money for ore, claiming it all and refusing to permit the cotenants of the person claiming it to participate in the profits, is an ouster of such cotenants: *Irvine v. Haulin*, 10 Serg. & R. (Pa.) 219. In *Susquehanna etc. Coal Co. v. Quick*, 61 Pa. St. 328, it is said that "open, notorious and uninterrupted possession of the whole, by a tenant in common for twenty-one years, claiming the whole land as his own, and taking the whole profits exclusively to himself, is evidence from which a jury may draw the conclusion of an ouster and an adverse possession. The distinction is that it does not afford a legal presumption, which would entitle the court to withdraw the question from the jury, and instruct them that they must infer an ouster. . . . The question of fact must be determined by the jury, for it may appear from all the circumstances that the possession is not adverse, notwithstanding the long-continued reception of the profits": See, also, in this general connection, *Hebard v. Jefferson Gold etc. Min. Co.*, 33 Cal. 290.

IV. Operation of Common Property by One Cotenant.

a. In General.—So long as the questions arising between cotenants of mines affect the right to the possession merely, they are easy of solution. They seldom, however, concern merely the right to possession. Mining property is, as a rule, valuable only for the mineral contained in it, and this can be availed of only by the extraction of ore, and possession is, therefore, desirable usually only so far as it enables the possessor to work the mine. The question immediately arises as to the right of one tenant in possession to employ the common property by the removal of ore.

b. Waste.

1. Liability of Cotenant for.—At the early common law one tenant in common had no right of action against his cotenant for waste of

the joint estate by the latter: *Williamson v. Jones*, 43 W. Va. 562, 64 Am. St. Rep. 891, 27 S. E. 411; *Cecil v. Clark*, 47 W. Va. 402, 81 Am. St. Rep. 802, 35 S. E. 11. This was, however, early changed, the statute of Westminster II giving the injured cotenant an action for waste by his co-owner, and in many of the states of this country the right of action in such case is provided for by statute. It seems, moreover, that where the common law provides no remedy, a court of equity will interfere when it appears that waste has been committed or threatened by one cotenant: *McCord v. Oakland Quicksilver Min. Co.*, 64 Cal. 134, 49 Am. Rep. 686, 27 Pac. 863.

2. What Constitutes.—What, then, constitutes waste by a tenant in common of a mine? According to one line of authorities, of which *McCord v. Oakland Quicksilver Min. Co.*, 64 Cal. 134, 49 Am. Rep. 686, 27 Pac. 863, is the leading case, there can be no use of mining property which is not to some extent a destruction of the property itself. To hold that such a use of it by one cotenant is a "waste" of the property, is, according to the view of these cases, to lose sight of the nature of the property, and to condemn all mining property held in common to idleness, unless all join in its operation, or the cotenant seeking to employ it is willing to do so under a liability to be sued for waste by his cotenants, and, under the statutes of some states (as of California), to be mulcted in treble damages. The reasoning is cogent, and by the better rule one tenant in common of a mine does not commit waste, within the meaning of the statutes, where he mines the common property without unnecessary damage to the mine or its works and with care and skill: *McCord v. Oakland Quicksilver Min. Co.*, 64 Cal. 134, 49 Am. Rep. 686, 27 Pac. 863; *Russell v. Merchants' Bank*, 47 Minn. 286, 28 Am. St. Rep. 368, 50 N. W. 228; *Anaconda Copper Min. Co. v. Butte etc. Min. Co.*, 17 Mont. 519, 43 Pac. 924; *Vervalen v. Older*, 8 N. J. Eq. 98. See, also, *Joh v. Patton*, 44 L. J. Ch. 262, 32 L. T. 110, L. R. 20 Eq. 84. The authorities are not, however, uniform in so holding, and it is held by some that any removal of the substance of the property is waste. Boring for oil or the removal of coal is, according to these cases, a destruction of the freehold, and renders the person so operating on the land liable to a statutory action for waste. Under this view it is difficult to see what "use," as distinguished from "waste," can be made of a mine by a tenant in common, and the cases upholding it seem opposed both to principle, and to the weight of authority: See, however, as adopting this doctrine, *Cecil v. Clark*, 47 W. Va. 402, 35 S. E. 11; *Williamson v. Jones*, 43 W. Va. 562, 64 Am. St. Rep. 891, 27 S. E. 411. See, also, *Murray v. Haverty*, 70 Ill. 318, distinguished in *McCord v. Oakland Quicksilver Min. Co.*, 64 Cal. 134, 49 Am. Rep. 686, 27 Pac. 863.

c. Right of Other Cotenants to Enjoin.

1. General Rule.—By the better rule, therefore, and that supported by the apparent weight of authority, so long as there is no exclusion

of his cotenants by the tenant in possession and operating the mine, he cannot be enjoined from operating it, or held liable as for waste. His associates are free at any time to enter and participate in the mine with him, and their failure to do so should not prevent him from employing the property, or render him liable as for waste, if he does employ it: *McCord v. Oakland Quicksilver Min. Co.*, 64 Cal. 134, 49 Am. Rep. 686, 27 Pac. 863, distinguishing *Dougall v. Foster*, 4 Grant N. C. 319. Compare *Goodenbough v. Farquhar*, 19 Grant, 614.

2. Under Montana Statute.—In Montana, this rule was changed by a provision of the Code of Civil Procedure of 1895, which, until its amendment in 1899, provided that "if any person shall assume and exercise exclusive ownership over or take away, destroy, lessen in value, or otherwise injure or abuse any property held in joint tenancy or tenancy in common, the party aggrieved shall have his action for the injury in the same manner as he would have if such joint tenancy or tenancy in common did not exist." Under this it was held that one tenant in common could enjoin his cotenant from operating the mine. This was not on the ground that such operation was waste, but on the ground that the removal of ore was within the express inhibition of the statute: See *Anaconda Copper Min. Co. v. Butte etc. Min. Co.*, 17 Mont. 519, 43 Pac. 924; *Red Mountain Consolidated Min. Co. v. Esler*, 18 Mont. 174, 44 Pac. 23; *Connole v. Boston etc. Min. Co.*, 20 Mont. 523, 52 Pac. 263; *Harrigan v. Lynch*, 21 Mont. 36, 52 Pac. 642. Compare *Murray v. Haverty*, 70 Ill. 318, as distinguished in *McCord v. Oakland Quicksilver Min. Co.*, 64 Cal. 134, 49 Am. Rep. 686, 27 Pac. 683. That the operations increased the value of the claim was immaterial: *Harrigan v. Lynch*, 21 Mont. 36, 52 Pac. 642. Nor was the removal of ore alone prohibited. One cotenant could, it was held, prevent another from erecting a tramway over the common property: *Connole v. Boston etc. Min. Co.*, 20 Mont. 523, 52 Pac. 263; although the statute did not permit one owner to prevent his cotenant from performing the annual labor necessary to hold the claim: *Harrigan v. Lynch*, 21 Mont. 36, 52 Pac. 642; *Butte & Boston Con. Min. Co. v. Montana Ore Purchasing Co.*, 24 Mont. 125, 60 Pac. 1039. The policy of this law proved disastrous, preventing, as it did, the operation of any mine except with the consent of all cotenants. Accordingly, it was amended in 1899 to permit one cotenant to mine the common property, if he desired, in a miner-like manner, the statute protecting the rights of his associates by rendering the operator alone liable for expenses, incapable of fastening a lien on his cotenant's interest, while it gave to them the right to demand an account or to take their share of the ore mined. For a consideration of the statute as amended, see *Butte & Boston Min. Co. v. Montana Ore Purchasing Co.*, 24 Mont. 125, 60 Pac. 1039. On a rehearing of this case (25 Mont. 41, 63 Pac. 825), the amendment was held unconstitutional and void as to cotenancies created prior to its passage.

3. Use of Common Workings to Operate Adjacent Mines not Held in Common.—In *People v. District Court*, 27 Colo. 465, 62 Pac. 206, it is held that a tenant in common of a mine cannot employ a tunnel, run by all the cotenants for the purpose of working the common property, for his individual benefit by using it as a means of working adjoining property in which his cotenants have no interest. It appearing that he had excluded the latter from the tunnel, an injunction was held proper to compel him to admit his co-owners to the possession and use of the tunnel, and to prohibit him from employing it for his individual benefit. Under similar circumstances in *Clegg v. Clegg*, 3 Giff. 322, 31 L. J. Ch. 153, where it appeared that the owner of the surface was renting to the owners of neighboring coal lands a tunnel built by himself and others to work minerals held in common, he was held liable to account to his cotenants for such rents. While an injunction was prayed for, none seems to have been granted.

V. Accounts Between.

a. Right to Compel Account from Cotenant in Possession of the Common Property.

1. In General.—So far, our consideration of the right of one cotenant to work the mine himself has been without reference to any liability on his part to account to the nonoperating cotenants for the profits received. No tenant in common may, as we have seen, exclude his cotenants from their right to participate in the employment of the mine, and if they are so excluded, they may regain possession in an appropriate proceeding. On the other hand, by the better rule the inaction of his associates cannot deprive one cotenant of his right to employ the mine profitably, and in the absence of a statute to the contrary, he may enter and mine alone if the others do not see fit to join him. There remains to be considered, however, the accountability of a cotenant so operating to his co-owners not participating with him in the working of the mine, for such profits as he may realize therefrom. With reference to cotenancies generally, this is quite fully considered in the monographic note to *Ward v. Ward*, 52 Am. St. Rep. 924, on the liability of one cotenant to another for rents and profits received from, and for expenditures made upon, their common property.

2. At Common Law.—The common law did not recognize any right in a tenant in common out of possession to compel his cotenant in possession to account to him for any rents or profits of the common estate received by the possessor as cotenant merely. Each had the equal right to possession, and if one failed to take advantage of this right while the other did, the former could not, in the absence of an agreement that the possessor act as his bailiff in the receipts of rents and profits, require him to account: *Edsall v. Merrill*, 37 N. J. Eq. 114; *Graham v. Pierce*, 19 Gratt. 28, 100 Am. Dec. 658; monographic notes to *Ward v. Ward*, 52 Am. St. Rep. 924, and *Early v. Friend*, 78 Am. Dec. 665; *Freeman on Cotenancy and Partition*, sec.

269. Where, however, the tenant in possession has been constituted the bailiff of his cotenant, he is even at the common law bound to account to his principal for all sums received by him as bailiff, and this includes his cotenant's share of the proceeds of the mine: *Barnum v. Loudon*, 25 Conn. 137.

3. Under Statute of 4 and 5 Anne and Similar Legislation.

A. In General.—This rule of the common law as to the accountability of one cotenant to another was changed in England by the Statute of 4 and 5 Anne, chapter 16, by which it was provided that one cotenant might have an action of account against "the other as bailiff, for receiving more than comes to his just share or proportion." In some of the jurisdictions in this country statutes very similar to the English statute have been enacted, while in others it has been regarded as a part of the common law, although not in all: See the monographic note to *Ward v. Ward*, 52 Am. St. Rep. 924, 925, and *McCord v. Oakland Quicksilver Min. Co.*, 64 Cal. 134, 49 Am. Rep. 686, 27 Pac. 863.

B. For Receipt of Rents, etc.—Even where the statute or others of similar effect are in force, the courts are by no means agreed in the construction of it. Where the amount received by the tenant in possession is received by him from third persons as a rent or royalty for the use of the premises, the statute undoubtedly controls, and he is liable to account to his cotenants for all over his share of such rents: See monographic note to *Ward v. Ward*, 52 Am. St. Rep. 924, 925, and cases cited post, V, b, 1. It must appear, however, that such moneys were received by him as cotenant. If received by him as a member of another company claiming rights in the mining ground, he cannot be held liable as a cotenant: *Clark v. Jones*, 49 Cal. 618; and it must be alleged and shown that the cotenant from whom an accounting is sought has received more of the rents than is his just share: *Enterprise Oil etc. Co. v. National Transit Co.*, 172 Pa. St. 421, 51 Am. St. Rep. 746, 35 Atl. 687.

C. For Profits Resulting from Operation.—Where the profits received by the tenant in possession of mining property were received, not as rents or royalties, but as *fructus industriales*, as the result of his own labor and industry in operating the mine, the courts are in sharp conflict as to the applicability of the Statute of Anne and others of similar tenor. According to one line of cases, the statute applies only to cases where he has "received" more than comes to his just share, and not to cases where, instead of "receiving," he takes. These authorities, therefore, restrict the operation of the statute to cases where the tenant in possession has received from third persons more than his share of the rents of the common property, and do not apply it to cases where, by the employment of his own capital and industry, he has profitably operated the mine, without excluding his cotenants therefrom. Under such circumstances, according to this doctrine, he has received no more than his "just share or proportion." Where the risk is assumed and the enter-

prise, capital and labor necessary are furnished solely by one tenant in common, to permit the cotenants who have assumed no responsibilities nor furnished any aid to share in the profits of his enterprise, without any liability to contribute to possible losses, is regarded by this line of cases, it seems rightly, as neither politic nor just: See *McCord v. Oakland Quicksilver Min. Co.*, 64 Cal. 134, 49 Am. Rep. 686, 27 Pac. 863; *Edsall v. Merrill*, 37 N. J. Eq. 114; *Coleman's Appeal*, 62 Pa. St. 252, and cases cited in the monographic notes to *Ward v. Ward*, 52 Am. St. Rep. 924, 926, and *Early v. Friend*, 78 Am. Dec. 665, 666.

There is, however, a very decided conflict among the authorities, and with reference to cotenants in mines, many cases, if not the weight of authority, support the proposition that one tenant in common who is in possession is bound to account to his cotenants for any profits derived from his operations, although he has not excluded his cotenants or otherwise prevented them from participating in the working of the mine. According to these cases, the Statute of Anne and similar statutes in rendering one tenant liable to account to his cotenants "for receiving more than comes to his just share or proportion" intended to make him accountable for receiving more than his just share of the rents and profits, whether paid by a stranger or derived from his own occupation and enjoyment of the property. This is the view taken in *Early v. Friend*, 16 Gratt. 21, 78 Am. Dec. 649, in which, after noting the conflict between the English court of queen's bench in *Eason v. Henderson*, 12 Ad. & E., N. S., 986, and the court of exchequer chamber in *Henderson v. Eason*, 17 Ad. & E., N. S., 701, as to the proper construction of the Statute of Anne (see, also, *Edsall v. Merrill*, 37 N. J. Eq. 114), Moncreu, J., speaking for the court, says: "With all deference to the court of exchequer chamber, I think the construction they put upon the word 'receiving' is too technical and narrow, at least for our country; and if it be a just one in England, it is because of circumstances existing there which do not exist here. I do not see the force of the distinction drawn by that court between the words 'receive' and 'take' in this connection. I think the word 'receiving' in the statute literally means a receiving of profits, as well by use and occupation as by renting out the property. At all events, there is, in substance, no difference between them, and the former is as much within the reason and meaning of the law as the latter. If a tenant in common rent out the property, and receive more than his just share of the rent, he is accountable for the excess to his cotenants. Why should he not be alike accountable when, instead of renting out the property, he solely occupies and uses it and thus receives more than his just share of the profits? . . . I think the same principle precisely applies to the two cases."

There may, perhaps, be greater equity in such a construction of the statute in applying it to cotenants of mines than in cases of cotenancy of other property, due to the fact that employment of

mining property, unlike that of most other species of real property, tends to exhaust its chief source of value: See *McCord v. Oakland Quicksilver Min. Co.*, 64 Cal. 134, 147, 148, 49 Am. Rep. 686, 27 Pac. 863. At any rate, this view is quite well supported by authority, and under the Statute of Anne and others of similar import, the tenant operating a mine to his profit, receives "more than comes to his just share or proportion," and is liable to account to the nonoperating cotenants for their proportions of such profits: See *Paul v. Cragmaz*, 25 Nev. 295, 59 Pac. 857, 60 Pac. 983; *Abbey v. Wheeler*, 170 N. Y. 121, 62 N. E. 1074; *Id.*, 30 N. Y. Supp. 874, 10 Misc. Rep. 61; *Cosgriff v. Dewey*, 21 App. Div. 129, 47 N. Y. Supp. 255; *McCabe v. McCabe*, 18 Hun, 153; *Early v. Friend*, 16 Gratt. 21, 78 Am. Dec. 649; *Kahn v. Central Smelting Co.*, 102 U. S. 641; *Job v. Patton*, 44 L. J. Ch. 262, L. R. 20 Eq. 84, 32 L. T. 110; and as to cotenancies generally, see the monographic notes to *Ward v. Ward*, 52 Am. St. Rep. 924, 929, and to *Early v. Friend*, 78 Am. Dec. 665, 666.

The liability of a tenant in common under the Statute of Anne and those similar to it is only for what he receives beyond his just share or proportion. This does not mean, however, that such a tenant may continue to mine only until he has exhausted his proportion of the entire ore bed, nor that he cannot be called to an account until his operations extend beyond a portion to which he might be entitled if the mine were partitioned. The extent or richness of the remaining ore body is seldom or never capable of exact definition, and under those cases which hold a cotenant liable where he operates alone, his "just share and proportion" of any profits realized by him is regarded as being merely such proportion of the proceeds, as they accrue, as his share in the mine bears to the shares held by all the cotenants: *Barnum v. Loudon*, 25 Conn. 137. Compare *Hall v. Fisher*, 20 Barb. 443; *Coleman's Appeal*, 62 Pa. St. 252, affirming *Coleman v. Coleman*, 1 Pears. 470; *Cecil v. Clark*, 47 W. Va. 402, 81 Am. St. Rep. 802, 35 S. E. 11.

4. Where Other Cotenants have been Excluded.—Where the tenant in sole possession of the premises and operating the mine alone has excluded his cotenants, he is undoubtedly liable to account to them for any profits he may have realized, and, it seems, for the use and occupation of the premises, even where he has made no profit whatever: *Edsall v. Merrill*, 37 N. J. Eq. 114; *Paul v. Cragmaz*, 25 Nev. 295, 59 Pac. 857, 60 Pac. 983. This is a common-law liability, although the construction given the Statute of Anne in *Early v. Friend*, 16 Gratt. 21, 78 Am. Dec. 649, seems to cover but little, if any, more ground. "This rule, at least, may be laid down, that whenever the nature of the property is such as not to admit of its use and occupation by several, or wherever the property, though capable of use and occupation by several, is yet so used and occupied by one as in effect to exclude the others, he receives more than comes to his just share or proportion, in the meaning of the statute, and is accountable to the others." See, as to the liability

of a tenant in common generally to account for rents and profits during the exclusion of his cotenant, the monographic note to Ward v. Ward, 52 Am. St. Rep. 924, 928.

5. Under Pennsylvania Statute.—In Pennsylvania, by a statute passed in 1850 (Act of Assembly, April 25, 1850, sec. 24, Pamphlet Laws, 573), an account may be had between cotenants of mines whenever any of the tenants removes any of the ore. Under this act no questions arise, as under the Statute of Anne, as to what constitutes a "receipt" of more than his "just share or proportion" by one cotenant which entitles his co-owners to an accounting. Any tenant in common taking ore from the common property can be made to account: See Coleman's Appeal, 62 Pa. St. 252; Coleman v. Coleman, 1 Pears. 470; Fulmer's Appeal, 128 Pa. St. 24, 15 Am. St. Rep. 662, 18 Atl. 493; McGowan v. Bailey, 179 Pa. St. 470, 36 Atl. 325; Mercur v. State Line etc. Ry. Co., 171 Pa. St. 12, 32 Atl. 1126.

b. Basis of.

1. Where Rents or Royalties are Received.—Where the amount for which one tenant in common is liable to account to his cotenants is a rental of the premises received from a stranger, there is ordinarily but little difficulty in determining what constitutes his just share or proportion: Early v. Friend, 16 Gratt. 21, 78 Am. Dec. 649. See, also, Cecil v. Clark, 49 W. Va. 459, 39 S. E. 202. In Mercur v. State Line etc. Ry. Co., 171 Pa. St. 12, 32 Atl. 1126, it was held, however, in a proceeding under the statute of Pennsylvania of 1850 (see preceding paragraph), that where one of three tenants in common of coal sells his interest in the coal at a certain royalty to a company which proceeds to operate the land, the royalty fixed by the agreement to sell will not bind other tenants in common who are not parties to the agreement. As to them the royalty that should be paid is a question to be settled, either by agreement or by a court of equity under the statute mentioned. Where one of the cotenants of an oil lease did not join in an assignment of the lease by the others to an operator, who was to deliver a part of the product to them, the nonjoining tenant in common, it was held, could not in one breath affirm and repudiate the assignment. If he chose to affirm it, he must take his share with the others upon a distribution of the royalty after the deduction of all proper charges and expenses; while if, on the other hand, he did not affirm it, he could claim no share in the royalty, and must look to the assignee as a cotenant: Enterprise Oil etc. Co. v. National Transit Co., 173 Pa. St. 421, 51 Am. St. Rep. 746, 33 Atl. 687.

2. Where Profits Result from Operation.

A. When Value of Mineral in Place is Proper Basis.—Where the profits made by the occupying tenant in common have been made as a result of his own operations, the basis of account is not so easy to determine. By the statute of Pennsylvania of 1850 (see

supra, V, a, 5), the sum which is to be allowed one tenant in common whose cotenants have removed part of the mineral held in common is such as "may be justly and equitably due." In the construction of this statute the courts have uniformly held that there is not "justly and equitably due" to one tenant any share of the profits earned by his cotenant at his own risk and expense. "For the thing taken is mineral in place, as it lies in a state of nature. It is this of which the tenant out of possession is deprived, and it is this for which he ought to be compensated": Fulmer's Appeal, 128 Pa. St. 24, 15 Am. St. Rep. 662, 18 Atl. 493. Accordingly, while each case must rest upon its own facts, and no uniform rule applicable to all circumstances can be laid down (Fulmer's Appeal, 128 Pa. St. 24, 15 Am. St. Rep. 662, 18 Atl. 493. See, also, Clowser v. Joplin Min. Co., 4 Dill. 469, note, Fed. Cas. No. 2908a), the basis of account in such cases is the value of the mineral in place: Fulmer's Appeal, 128 Pa. St. 24, 15 Am. St. Rep. 662, 18 Atl. 493; McGowan v. Bailey, 179 Pa. St. 470, 36 Atl. 325; Coleman's Appeal, 62 Pa. St. 252. This value is "the same as the value of the 'ore leave'—that is, what the right to dig and take the ore is worth," and where the usual royalty paid for such privilege is ascertainable, it is obviously the proper basis of account: Fulmer's Appeal, 128 Pa. St. 24, 15 Am. St. Rep. 662, 18 Atl. 493; Schreiber v. National Transit Co., 21 Pa. Co. Ct. Rep. 657. Where, however, the amount of royalty ordinarily paid under the same or similar circumstances cannot be ascertained, or where the mining is attended with no risk, and requires no skill, the value of the mineral in place can perhaps best be obtained by deducting from its value at the pit's mouth the cost of its severance and handling, and such is the method adopted in these cases: McGowan v. Bailey, 179 Pa. St. 470, 36 Atl. 325; Coleman's Appeal, 62 Pa. St. 252, distinguished in Fulmer's Appeal, 128 Pa. St. 24, 15 Am. St. Rep. 662, 18 Atl. 493. This basis of account, the value of the mineral in place, has also been adopted in some jurisdictions other than Pennsylvania, where the operations of the tenant in possession were conducted under peculiar circumstances, as where he had worked the mine, believing in good faith that he had acquired the interest of his cotenant: Keys v. Pittsburgh etc. Coal Co., 58 Ohio St. 246, 65 Am. St. Rep. 754, 50 N. E. 911; or where the nonoperating cotenant had for years paid no attention to the land and the party called upon to account had developed, if not discovered, the mineral on the land, and at the time of the reappearance of the absent cotenant each claimed to own the whole of the land: Clowser v. Joplin Min. Co., 4 Dill. 469, note, Fed. Cas. No. 2908a.

B. When Actual Profits are Proper Basis.—The method of accounting just considered is undoubtedly the most equitable. Whatever injury is done to the nonoperating tenant's share in the mining property is fully compensated by allowing him his share of the value of the ore taken, situated as it was at the time of the

taking. To allow more is to award a person who has taken no risk, performed no labor, and expended no money, a share in the profits of one who, at his own risk and expense, and by his own diligence, has succeeded in making a profit by taking his share of the common property in the only possible way. Where, however, the Statute of Anne or statutory provisions of similar import are in force, and are construed to cover the case in which one tenant in common by his own unaided operations has made a profit from the common property (see *supra*, V, a, 3, c), the profits actually made are regarded as the proper basis for an accounting under the statute between cotenants of mines. "A tenant of such property necessarily uses a part of the subject itself, and may by such uses render the residue of the subject of little or no value. It may be discovered by explorations and operations that the property is of great value, or the contrary. To rent it for a certain sum is to make a bargain of speculation and hazard, which is always objectionable in such cases, as it is almost sure to operate unequally on the parties": *Newman v. Newman*, 27 Gratt. 714.

Accordingly, unless the property is of such a character that its annual rental value may be accurately ascertained (as in the case of salt wells: See *Early v. Friend*, 16 Gratt. 21, 78 Am. Dec. 649), the best mode of settling such an account is, according to the authorities, to ascertain the actual profits earned by the operating tenant, and to distribute them among the several cotenants according to their respective shares: *Ruffner v. Lewis*, 7 Leigh (Va.), 720, 30 Am. Dec. 513; *Newman v. Newman*, 27 Gratt. 714; *Graham v. Pierce*, 19 Gratt. 28, 100 Am. Dec. 658; *Job v. Patton*, 44 L. J. Ch. 262, L. R. 20 Eq. 84, 32 L. T. 110. This, it is held in the case last cited, is, in the case of a coal mine, the value of the coal at the pit's mouth, less the cost of getting and raising.

c. Items in.

1. *Operating Expenses, etc.*—The nonoperating tenant in common seeking to compel his cotenant to account is entitled to such profits only as remain after deducting all proper charges and expenditures. The cotenant called upon to account is entitled to deduct all proper operating expenses: *Paul v. Cagnaz*, 25 Nev. 295, 59 Pac. 857, 60 Pac. 983; *Job v. Patton*, 44 L. J. Ch. 262, L. R. 20 Eq. 84, 32 L. T. 110; and to a reimbursement of all above his share of the expenditures, necessarily incurred in protecting the common possession, and in buying in an outstanding title, paramount to that of the cotenants or such as a prudent man would deem it proper to purchase to avoid expensive and dangerous litigation: *McCord v. Oakland Quick-silver Min. Co.*, 64 Cal. 134, 49 Am. Rep. 686, 27 Pac. 863. In *Foster v. Weaver*, 118 Pa. St. 42, 4 Am. St. Rep. 573, 12 Atl. 313, it appeared that a tenant in common of an oil lease, whose interest had been fraudulently secured at an undervalue by his cotenant, but who, on discovery of the fraud, demanded a reconveyance of his interest, was

entitled to his share of the product of the lease during his fraudulent exclusion, without any reimbursement of his cotenant for the expense of mining or producing it, the court not regarding it as "the policy of the law to make the way of the transgressor easy and secure."

2. **Services of Operating Cotenant.**—In the computation of expenses the operating tenant is entitled to reimbursement for the fair value of his expenses. In the language of Van Fleet, V. C., in *Edsall v. Merrill*, 37 N. J. Eq. 114: "Where two of the tenants in common have provided all the capital of the venture, done all the work and furnished all the skill, it would be neither accurate nor just in ascertaining what sum represented the profits, in order that a just division of them might be made among all the tenants, to leave out of the computation the value of the labor and services of those who incurred all the risk. . . . The tenant who keeps aloof and free from risk until the hazards have all been run and the dangers are all past and then comes forward seeking to share in the profits of a venture he had not the courage to join, and to the success of which he has contributed nothing, certainly is not in a position to demand that the court, in ascertaining what the profits are, shall be cautious almost to niggardliness toward those whose capacity and enterprise have made the venture a success." To the same effect, see *Newman v. Newman*, 27 Gratt. 714; and compare *Ruffner v. Lewis*, 7 Leigh (Va.), 720, 30 Am. Dec. 513. One tenant cannot, however, be allowed compensation for his time and trouble in selling the ore when it was against the interest of the other owners that any be sold: *Coleman v. Coleman*, 2 Pears. (Pa.) 511; nor, although he may be entitled to an allowance for his services in the settlement of an account, can he maintain assumpsit for such services against his cotenant where there has been no contract of employment between them: *Thompson v. Newton* (Pa.), 7 Atl. 64, affirming 2 Pa. Co. Ct. Rep. 362; *Murtland v. Callihan*, 2 Pa. Super. Ct. 340.

3. **When Interest is Allowable.**—Where there has been any considerable employment of capital by the tenant in possession of, and operating a mine, this is, likewise, a proper element in the computation of the net profits for which he is accountable, and he is entitled to interest upon the sum invested: *Newman v. Newman*, 27 Gratt. 741. So it was held in *Cecil v. Clark*, 49 W. Va. 459, 39 S. E. 202, that where the tenant in possession of the mine purchases "front lands" in his own name, and not as common property, if such lands were necessary to secure a right of way for the removal of the product of the mine, the expenditure thus made should be treated as an expense incurred in providing necessary conveniences in getting out such products, and legal interest on the amount of the investment was allowed. Where both cotenants delay an accounting, interest on the sum found due is properly allowable only after the balance is struck: *Grubb's Appeal*, 66 Pa. St. 117. See, also, as to the allow-

ance of interest on the share of the tenant out of possession in the rents and profits, *Huff v. McDonald*, 22 Ga. 131, 68 Am. Dec. 487; *Early v. Friend*, 16 Gratt. 21, 78 Am. Dec. 649.

4. **Improvements.**—The question when the value of improvements will be allowed one cotenant in accounting between himself and associates is considered in the monographic note to *Ward v. Ward*, 52 Am. St. Rep. 924, 935-941. One cotenant of a mine cannot, of course, bind another for improvements made by himself and without authority from such other: *Rico Reduction etc. Co. v. Musgrave*, 14 Colo. 79, 23 Pac. 458; nor does an action for contribution for such improvements lie against a cotenant in the absence of an agreement that he contribute: *Neuman v. Dreifurst*, 9 Colo. 228, 11 Pac. 98. Where, however, a court of equity in the settlements of accounts between such cotenants or in the partition of the common property finds that improvements have been made upon such property by one of the parties, it may adjust the rights of the parties, and, where equitable and proper, will allow the one making the improvements contribution from the others for the amount thus expended: *Newman v. Dreifurst*, 9 Colo. 228, 11 Pac. 98; *Ruffner v. Lewis*, 7 Leigh (Va.), 720, 30 Am. Dec. 513; *Williamson v. Jones*, 43 W. Va. 562, 64 Am. St. Rep. 891, 27 S. E. 411. The mere fact that the operations have increased the value of the premises instead of diminishing them cannot, however, relieve the operating cotenant from his liability to account: *Cosgriff v. Dewey*, 21 App. Div. 129, 47 N. Y. Supp. 255. Compare *Harrington v. Lynch*, 21 Mont. 36, 52 Pac. 642. See, as to the liability of a cotenant to contribute his proportion of the cost of the assessment work, *Holbrooke v. Harrington* (Cal.), 36 Pac. 365; and for the remedies of his co-owners where he fails to so contribute, see the monographic note to *McKay v. McDougall*, 87 Am. St. Rep. 403; 11, e.

d. **Liens.**—A cotenant, as such, has no lien upon the common property or the profits derived from it, for the amount of his expenditures, or for the balance found due him on the settlement of the co-ownership accounts: *Sawyer, J., in Duryea v. Burt*, 28 Cal. 569; *Brunswick v. Winter*, 3 N. Mex. 386, 5 Pac. 706. Compare, also, *First Nat. Bank v. G. V. B. Min. Co.*, 89 Fed. 449. Nor does a contract by which the management of the mine is given to one part owner, he to reimburse himself from the proceeds, create a lien for such allowances on the property, and where there is no guaranty of the sufficiency of the proceeds, and the personal liability of the co-owners is expressly excluded, the only remedy of the operating cotenants is to reimburse himself by working the mine: *Frowenfeld v. Hastings*, 134 Cal. 128, 66 Pac. 178. One cotenant cannot, without authority from his co-owner, charge the interest of the latter with a miner's or mechanic's lien for improvements on the common property: *Rico Reduction etc. Co. v. Musgrave*, 14 Colo. 79, 23 Pac. 458.

e. **Joinder of Parties and Actions in Suit for Accounting.**—By the statute of Pennsylvania of 1850, providing for an account between cotenants of mines whenever there has been a removal of ore by less than the whole number of cotenants, all the cotenants are to be

53 Pac. 178. See, also, as to presumption of assent by absentees to location of claim in their name, *supra*, I, d, 2.

b. Conveyance by Metes and Bounds.—There has been considerable discussion and no little conflict among the authorities as to the effect of a conveyance by one cotenant of the whole or a portion of the common property by metes and bounds. This question will be found considered in *Freeman on Cotenancy and Partition*, sections 199-207. Such a conveyance is, it seems, by the weight of authority, valid as against the grantor, and operates to convey his interest in the portion described, but cannot, in any way, prejudice the rights of his cotenants. The grantee takes whatever interest the grantor had in the portion conveyed, and no more. He cannot affect the right of partition in the cotenants of his grantor, nor on such partition has he any right to have the portion mentioned in the conveyance allotted to himself: *Hartford etc. Co. v. Miller*, 41 Conn. 112; *Paul v. Crag-naz*, 25 Nev. 295, 59 Pac. 857, 60 Pac. 983; *Boston Franklinite Co. v. Condit*, 19 N. J. Eq. 394; *Harland v. Central Phosphate Co.* (Tenn.), 62 S. W. 614; *Tipping v. Robbins*, 71 Wis. 507, 37 N. W. 427. The same rules are applicable where a cotenant in mining property in granting his interest seeks to sever surface and subsurface rights by reserving in terms all the mineral in the land. The same reasons which apply where the conveyance is by metes and bounds, control where the attempt to parcel out to different persons the interest of the conveying cotenant to the surface and to the minerals: *Adams v. Briggs Iron Co.*, 7 Cush. 361; *Boston Franklinite Co. v. Condit*, 19 N. J. Eq. 394.

c. Conveyance of Cotenant's Interest.—One cotenant, as such, has no implied authority to dispose of his cotenant's interest in the common property, and any attempt on his part to dispose of such interest will be void as to his cotenant: *Waring v. Crow*, 11 Cal. 366; *Murley v. Ennis*, 2 Colo. 300; *Chase v. Savage Min. Co.*, 2 Nev. 9; *Milton v. Hague*, 39 N. C. 415. Even if he is possessed of express authority to convey the interest of his co-owner, unless his power is mentioned in the conveyance which he makes, it will be deemed to convey only his own interest: *Gillet v. Gaffney*, 3 Colo. 351 (townsite location). Where one tenant in common does attempt to dispose of his cotenant's interest without authority to do so, the cotenant has two courses open to him. He may treat the attempted sale of his interest as a nullity, and if the grantee refuses to admit him to possession of the premises, may bring ejectment and recover such possession, or he may, at his election, affirm what has been done, and treat the money received for his interest as money received to his use. In the latter case assumpsit will lie even in the absence of an express promise: *Murley v. Ennis*, 2 Colo. 300. Compare, however, *Milton v. Hague*, 39 N. C. 415.

d. Leases and Licenses.—As to the effect of a lease or license given by one tenant in common to a stranger, purporting to authorize

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the lessee or licensee to conduct mining operations upon the premises held in common: According to one view, such a license stands upon the same footing as a conveyance by one tenant in common of a portion of the joint estate by metes and bounds (see *supra*, VI, b), and confers no right on the grantee (as against the cotenants of his grantor, at least), to mine upon the premises held in common: *Tipping v. Robbins*, 64 Wis. 546, 25 N. W. 713; *Tipping v. Robbins*, 71 Wis. 507, 37 N. W. 427. See, also, *Swint v. McCalmont Oil Co.*, 184 Pa. St. 202, 63 Am. St. Rep. 791, 38 Atl. 1021.

According to another, and what on principle seems the preferable view, a tenant in common may by a lease or license confer upon a stranger such rights as he himself has and no more. Accordingly, in those jurisdictions in which mining by one cotenant alone is regarded as waste or for any other reason not permissible (see *supra*, IV, b, c), the licensee of such a tenant takes no greater rights than his grantor: *Murray v. Haverty*, 70 Ill. 318. See, also, *Goodenough v. Farquhar*, 19 Grant, 614.

Where, however, the right of one tenant in common to conduct mining operations on the common property is recognized, each tenant may, according to the view last mentioned, confer by license upon a stranger such right as he himself possesses, and the license of any one of them without the concurrence of his cotenants is sufficient to authorize the licensee to enter upon the common property and mine: *Ord v. Chester*, 18 Cal. 77; *Paul v. Cagnaz*, 25 Nev. 295, 59 Pac. 857, 60 Pac. 983; *Williams v. Morrison*, 28 Fed. 872. Such a lease is not, properly speaking, a lease of the whole estate, nor of the whole of a distinct portion by metes and bounds; but is a lease of an undivided interest: *Paul v. Cagnaz*, 25 Nev. 295, 59 Pac. 857, 60 Pac. 983; and while the lessee is liable to the same extent as his grantor would have been if he misuse the property or is guilty of a conversion (*Omaha etc. Smelting etc. Co. v. Tabor*, 13 Colo. 41, 16 Am. St. Rep. 185, 21 Pac. 925), he is not a trespasser on the premises, and neither his grantor nor the cotenants of the latter can hold him liable as such: *Ord v. Chester*, 18 Cal. 77. Where the lessee is excluded from possession by the cotenants of his grantor, he is not confined to an action against them for an accounting, but may sue them for damages, based upon the loss of profits he would have made but for the ouster by them: *Paul v. Cagnaz*, 25 Nev. 295, 59 Pac. 857, 60 Pac. 983. Where there has been no such exclusion, the lessor may, undoubtedly, recover from the lessee for a breach of the contract of lease, without reference to the validity of such lease as against the co-owners of the grantor: *Colorado Iron etc. Co. v. Pryor*, 25 Colo. 540, 57 Pac. 51. Where the privilege granted is not contained in a lease, but is a mere license (see as to what determines this, *Paul v. Cagnaz*, 25 Nev. 295, 59 Pac. 857, 60 Pac. 983), it is terminable on notice: *Williams v. Morrison*, 28 Fed. 872.

c. **Admissions by, Fraud of, and Service of Process on, One Cotenant.**—The admissions or representations of one tenant in common

do not bind his cotenant: *Dexter Lime Rock Co. v. Dexter*, 6 R. J. 353. See, also, *Freeman on Cotenancy and Partition*, sec. 169. In *Grubb v. Grubb*, 74 Pa. St. 25, it appeared that in a deed from A to B, A had recited that he held as a cotenant with C. In a suit for partition, by the heirs of C against B, it was held that the recital was evidence of their title. This is not, however, a case in which the admission of one cotenant was held to bind another, but in which an admission by one from whom the defendant derived title. Service of process on one tenant in common is not binding on his cotenants who were not served and did not appear, and a judicial sale of their interests under a judgment recovered in such action is void, the purchaser taking no title as against them: *Wiseman v. McNulty*, 25 Cal. 230. Nor is the relation of cotenancy such that one tenant in common of a mine is affected by the fraud of his cotenant. In *Fisher v. Seymour* (Colo.), 49 Pac. 30, it appeared that a patent was obtained by one for several cotenants by one of their number, who was also an agent for a third person owning a conflicting location, and who, in thus applying for a patent, was acting in fraud of his principal. It was held that his interest in the title acquired by the proceedings for a patent was held by him in trust for his principal, but that the agent's fraud could not affect the title or interests of his cotenants.

VII. Abandonment and Forfeiture.

The subject of the abandonment and forfeiture of mining claims, including the abandonment and forfeiture of the interests of cotenants in such claims, will be found treated at length in the monographic note to *McKay v. McDougall*, 87 Am. St. Rep. 403-416.

VIII. Actions Between.

a. *Assumpsit*.—When, under the statute of Anne (see *supra*, V, a, 3, A), an action of *assumpsit* may be employed rather than the old action of *account render*, is a question upon which the authorities are not in harmony: See *Freeman on Cotenancy and Partition*, 280-286; some regarding an express promise to pay rent or to account as essential to the maintenance of an action of *assumpsit*: *Enterprise Oil etc. Co. v. National Transit Co.*, 172 Pa. St. 421, 51 Am. St. Rep. 746, 33 Atl. 687; *Irvine v. Hanlin*, 10 Serg. & R. 219; while others, giving to the statute a more liberal construction, allow *indebitatus assumpsit* in cases where one cotenant has taken more than his share of the products of a mine, and converted them into money: *Winton v. Pancoast Coal Co.*, 170 Pa. St. 437, 33 Atl. 110. See, also, *Murley v. Ennis*, 2 Colo. 300. So, where the taking by one tenant amounts to waste and there has been a sale by him of the ore taken, his cotenant may waive the tort and sue for his share as for money had and received: *Cecil v. Clark*, 49 W. Va. 459, 39 S. E. 202.

b. *For Ouster by One*.—Where one cotenant has ousted another, the appropriate remedy is *ejectment* (see the monographic note to

Marshall v. Palmer, 50 Am. St. Rep. 839-843), and not by a bill in equity. And a statute seeking to substitute the equitable procedure for the legal, in actions between cotenants, to recover possession, is where legal rights only are involved, held to conflict with a constitutional provision declaring inviolate the right of trial by jury, and applicable, therefore, only to cases in which the rights of the complainants are equitable: *North Pennsylvania Coal Co. v. Snowden*, 42 Pa. St. 488, 82 Am. Dec. 530, and note thereto, p. 536; *Frisbee's Appeal*, 88 Pa. St. 144; *Phillip's Appeal*, 68 Pa. St. 130. In an action of ejectment between cotenants, only the person claiming adversely to the plaintiff in the interest on which plaintiff's right to possession is based need be made defendants. Other cotenants who are in possession, but claim no right to the interest sued for, are not necessary parties: *Waring v. Crow*, 11 Cal. 366; *Coleman v. Clements*, 23 Cal. 245. A tenant in common may also recover damages for an ouster or exclusion by his cotenant, and where the plaintiff in claiming under a lease from one tenant in common was excluded for the entire period by the cotenant of the grantor, the measure of damages are the profits he would have made during the term, had he been let into possession: *Paul v. Cragmaz*, 25 Nev. 295, 59 Pac. 857, 60 Pac. 983. An action lies, it is said, between cotenants for a misuse, though not amounting to a destruction of the common property by one of their number: *Omaha etc. Smelting etc. Co. v. Tabor*, 13 Colo. 41, 16 Am. St. Rep. 185, 21 Pac. 925. Compare, however, *Hall v. Fisher*, 20 Barb. 443, and *Freeman on Cotenancy and Partition*, secs. 299-302.

IX. Partition.

a. *Voluntary*.—Cotenants of mining property may, undoubtedly, effect a voluntary partition of the property held in common. "The right of partition by the parties is an incident of ownership, and, like the right of an owner in severalty to a lien, is only limited by such restraints as the law has put upon it in regard to personal capacity and mode of conveyance": *Byers v. Byers*, 183 Pa. St. 509, 63 Am. St. Rep. 765, 38 Atl. 1027. Such a partition may be oral, and when executed by the occupation by the former cotenants of the parts allotted in severalty to each is, undoubtedly, valid: *Byers v. Byers*, 183 Pa. St. 509, 63 Am. St. Rep. 765, 38 Atl. 1027; *Four Hundred and Twenty Min. Co. v. Bullion Min. Co.*, 3 Saw. 634, Fed. Cas. No. 4989. In the *Pennsylvania* case above cited, it is said that while the law has been rested on the ground of part performance, taking the transaction out of the bar to the statute of frauds, "another and equally weighty reason might be added from the nature of tenancy in common. As each tenant has not only title, but joint and several possession, of the whole and of every part, the change to a title in severalty in any specified part is not such a transfer of title to land as is within the mischief contemplated by the statute of frauds": *Byers v. Byers*, 183 Pa. St. 509, 63 Am. St. Rep. 765, 38 Atl. 1027.

The effect of such a partition depends entirely upon the agreement of the parties, and it may be effected by horizontal divisions of the land, as well as by vertical divisions. The presumption is, however, that the partition was not confined to the surface, but included the whole estate, mineral and surface: *Byers v. Byers*, 183 Pa. St. 509, 63 Am. St. Rep. 765, 38 Atl. 1027. Where, however, the parties were not cotenants, but have mere equitable rights in the title of another person (as where one located and patented a mining claim under an agreement making him a trustee of such title for the benefit of the occupants of the claim), an agreement for the partition of the surface in a certain way between them cannot affect the rights of innocent purchasers of an undivided interest in the claim: *Mullins v. Butte Hardware Co.*, 25 Mont. 525, 87 Am. St. Rep. 430, 65 Pac. 1004. In *Lenfers v. Henke*, 73 Ill. 405, 24 Am. Rep. 263, it was held that where a widow seised of a one-third interest in mineral land makes an agreement with the heir seised of the other two-thirds that each shall receive one-half of the rents or profits of the mines, the agreement will be regarded as a valid assignment of dower in the remaining two-thirds.

b. By Legal Proceedings.

1. In General.—Partition by agreement of the parties is, when compared with the cases in which the courts are called upon to apply the remedy, of infrequent occurrence, and presents but few questions of difficulty. Where, however, the courts are appealed to, the difficulties ordinarily surrounding the application of this mode of relief are, when the subject sought to be partitioned is mining property, greatly increased by the peculiar nature of the property itself.

2. What Mining Interests are Partible.—An interest in mining property, such that cotenants of it may have partition, must be more than a mere license to dig in the land of another. Such an interest is not only uncertain in its extent, but "its division would create new rights, and would prejudice the owner of the soil": *Hughes v. Devlin*, 23 Cal. 501; *Smith v. Cooley*, 65 Cal. 46, 2 Pac. 880; *Canfield v. Ford*, 16 How. Pr. 473, 28 Barb. 336. Where, however, there is a distinct right of property in the mine or minerals, the interest, so far as the quantum of the estate is concerned, is sufficient to sustain a suit for its partition: *Canfield v. Ford*, 16 How. Pr. 473, 28 Barb. 336.

Accordingly, it is held that the interest of the locator of a mining claim on unpatented land is such, that where owned by several in common, it may be the subject of a suit for partition, although the title to the fee remains in the government. "Although the ultimate title in fee in our public mineral lands is vested in the United States, yet, as between individuals, all transactions and all rights, interests and estates in the mines are treated as being an estate in fee, and as a distinct and vested right of property in the claimant or claimants thereof founded upon their possession or appropriation of the land containing the mine. They are treated, as between themselves, and all persons but the United States, as the owners of the land and the

mines therein; and, as such, where the land or the mine is claimed by several, as joint tenants, tenants in common, or as copartners, or even as partners, such several interests or estates are in the nature of an estate of inheritance, and liable to be partitioned between the several claimants, the same as other real property": *Hughes v. Devlin*, 23 Cal. 501. See, to the same effect, *Aspen Min. etc. Co. v. Bucker*, 28 Fed. 220, in effect overruling *Strettell v. Ballou*, 3 McCrary, 46, 9 Fed. 256.

3. **Who may Compel.**—In order that there be a partition between them, the parties must be cotenants of the mine. The owner of the soil cannot, therefore, sue the owner of the mineral for a partition: *Smith v. Cooley*, 65 Cal. 46, 2 Pac. 880; nor where a conveyance by one tenant in common of land of the right to dig ore is deemed void as against his cotenants (see *supra*, VI, b, d) can the grantee of such a right maintain an action for the partition of the premises against the cotenants of his grantor: *Boston Franklinite Co. v. Condit*, 19 N. J. Eq. 394. Ordinarily, a tenant in common, in order to maintain an action for partition, must be in possession of the premises, proceedings for partition not having been designed as an alternative remedy with the action of ejectment: *Freeman on Cotenancy and Partition*, 447. This may, however, be changed by statute, and a statute making the right of possession sufficient to sustain partition proceedings in equity is not in conflict with a constitutional provision prohibiting the abolition of jury trial in actions at law, where such statute was existent at the time of the adoption of the constitution: *Cecil v. Clark*, 44 W. Va. 659, 30 S. E. 216.

4. Partible Nature of Mines.

A. **By Actual Partition.**—The right of cotenants in property to a partition of the same is ordinarily regarded as a matter of absolute right, unaffected by the difficulty and hardship of making the partition in the particular case. "Partition in some form, unless waived by an agreement between the cotenants, is something to which each has an absolute and unconditional right. In invoking the aid of a court of competent jurisdiction to enforce this right, he need not show any special cause for the partition. That he is a cotenant and no longer wishes to remain so, is sufficient to entitle him to relief. If the situation and character of the property are such that the court will not order it to be divided, then it must be sold. For partition, either by division of the property or by its sale and a division of the proceeds, is a matter of absolute right, against which no considerations of hardship inconvenience, or loss on the part of the other cotenants can prevail": *Freeman on Cotenancy and Partition*, 433. See, also, *Dall v. Confidence Silver Min. Co.*, 3 Nev. 531, 93 Am. Dec. 419.

This right may, of course, be waived by agreement among all the cotenants: *Coleman's Appeal*, 62 Pa. St. 252; *Coleman v. Coleman*, 19 Pa. St. 100, 57 Am. Dec. 641. Where, however, it is not waived,

the difficulties in the way of partition of mining property by actual division of the premises, with justice to all the cotenants, are such that partition in this manner is practically impossible, and the cases are full of expressions recognizing this fact. "Mining property, from its very nature, is not, as a rule, susceptible of partition. The ores are unevenly distributed, while the values are purely conjectural until tested by extended development and careful tests, which can only be obtained as the result of a vast expenditure of money and time": *Brown v. Challis*, 23 Colo. 145, 46 Pac. 679. To the same effect, see *Lenfers v. Henke*, 73 Ill. 405, 24 Am. Rep. 263; *Adams v. Briggs Iron Co.*, 7 Cush. 361; *Kemble v. Kemble*, 44 N. J. Eq. 454, 11 Atl. 733; *Paul v. Cragnaz*, 25 Nev. 295, 59 Pac. 857, 60 Pac. 983; *Coleman v. Coleman*, 19 Pa. St. 100, 57 Am. Dec. 641; *Conant v. Smith*, 1 Atk. (Vt.) 67, 15 Am. Dec. 669. Partition of mines is, therefore, refused where, by statute, it is not to be made where it cannot be done without great prejudice to the owners: *Kemble v. Kemble*, 44 N. J. Eq. 454, 11 Atl. 733. Whether partition of a mine can be equitably made is, of course, in any case, a question of fact, not to be helped by judicial notice of any fact not proved: *Mitchell v. Cline*, 84 Cal. 409, 24 Pac. 164. In the partition of mineral lands, a court may award surface rights of one cotenant, and to another the underlying minerals: *Ames v. Ames*, 160 Ill. 599, 43 N. E. 592.

B. By Sale.—At common law, no amount of difficulty or necessary injustice in making partition could confer jurisdiction on a court to order a sale of the premises, and a ratable distribution of the premises. This rule of the common law is, however, quite universally changed by statute, and a sale may now be ordered, where partition of the property itself would result in hardship or injustice: *Freeman on Cotenancy and Partition*, 536, 537. From the nature of mining property, this remedy must be the ordinary mode of relief in partition proceedings: *Brown v. Challis*, 23 Colo. 145, 46 Pac. 679; *Aspen Min. etc. Co. v. Rucker*, 28 Fed. 220; *Rickards v. Rickards*, 38 L. J. Ch., N. S., 176. Where an action for partition is begun under statutes permitting the court to sell the property, if actual partition cannot justly be made, an act passed during the pendency of such proceedings, and purporting to take away the power of sale in such cases is, as to pending actions, in violation of a constitutional provision prohibiting retrospective legislation: *Brown v. Challis*, 23 Colo. 145, 46 Pac. 679. According to the opinion of the court in this case, actual partition of mining property is ordinarily so impracticable "that it is known in advance of bringing suit for partition that the only feasible relief that can be awarded is a decree for the sale of the property. Take away this relief, and no cause of action can be maintained." The provisions of the statute must be followed, and it must, therefore, appear, in order to warrant a sale, that partition of the premises would result in great prejudice: *Dall v. Confidence Silver Min. Co.*, 3 Nev. 531, 93 Am. Dec. 419; but this may be admitted by the pleadings: *Hughes v.*

Devlin, 23 Cal. 501. And see in this connection, *Lorenz v. Jacobs*, 59 Cal. 262; *McGillivray v. Evans*, 27 Cal. 92.

In *Conant v. Smith*, 1 Atk. (Vt.) 67, 15 Am. Dec. 669, the court went so far as to refuse both a partition and a sale, saying: "The situation and quality of the property is such as to justify the court in declining to order a partition or sale. The exact extent of the ore bed is probably not yet known; and much less is the comparative depth and richness of its several parts. It would, therefore, be very hazardous to attempt a final division of the land itself, and to order a division in point of time, by directing the parties to improve the whole succession according to their interests would operate to destroy all benefit to the owners of a small share. And then to direct a sale of the defendant's share without their consent, though authorized by the statute, is against common right, and ought to be avoided, if equal or better justice can be obtained in another way. The court of chancery has power to preserve the rights of the parties and avoid all these evils. They can regulate the enjoyment of this property between the owners by restricting them to the proportion of their respective interests, by compelling accounts between them, and by appointing a common receiver for all parties. It is further to be recollected that the orders of the court are not necessarily peremptory and final; but may be altered from time to time and suited to the varying state of the subject and condition of the parties. To that jurisdiction we must, therefore, refer the petitioners, and refuse their present application."

5. **Improvements.**—Where one cotenant, at his own expense, has made improvements on the common property, a court will, in partition proceedings, adjust the equities of the parties in this regard: *Newman v. Dreifurst*, 9 Colo. 228, 11 Pac. 98. For a consideration of the cases in which such adjustment is made by setting off the improved portion to the cotenant making the improvements, or by decreeing compensation to him therefor on a sale of the premises, see monographic note to *Ward v. Ward*, 52 Am. St. Rep. 924, 938. The mere fact that a tenant operating the mine alone has not extended his operations beyond the proportion of surface which his share bears to the whole does not excuse him from accounting, since there is no certainty that the other parts are equally rich, and the court could not, therefore, in justice to the other tenants, allot him the portion mined by him. Where, however, he has once accounted to his cotenants for their share of the ore removed, they cannot, on partition of the premises, compel him to take the exhausted portion of the land: *Cecil v. Clark*, 47 W. Va. 402, 81 Am. St. Rep. 802, 35 S. E. 11. A cotenant is not, on partition of the common premises, entitled to an allowance for improvements made on an adjoining claim owned by himself alone. Whatever benefits in increased value accrued to the common property were purely incidental: *Dall v. Confidence Silver Min. Co.*, 3 Nev. 531, 93 Am. Dec. 419.

X. Actions Between Cotenants and Third Persons.

Tenants in common of mines should join in an action against third persons for an injury to or a nuisance affecting the common property: *Parke v. Kilham*, 8 Cal. 77, 68 Am. Dec. 310. At common law, tenants in common could not join in an action of ejectment against a third person, the interest of each being separate and distinct: *Freeman on Cotenancy and Partition*, 431. This rule is, however, quite generally changed by statute, and they may in most states join if they see fit to do so: See *Goller v. Fett*, 30 Cal. 481; *Weese v. Barker*, 7 Colo. 178, 2 Pac. 919. One tenant in common alone may, of course, bring an action of ejectment against a stranger: *Morenhaut v. Wilson*, 52 Cal. 263, 1 Mor. Min. Rep. 53; *Brown v. Warren*, 16 Nev. 228; and where the complainant clearly shows his intention to regain possession of the entire premises (see *Bullion Min. Co. v. Croesus Min. Co.*, 2 Nev. 168, 180, 90 Am. Dec. 526), is, by the weight of authority, entitled to recover exclusive possession as against all but his cotenants: *Melton v. Lombard*, 51 Cal. 258; *Weise v. Barker*, 7 Colo. 178, 2 Pac. 919; *Bullion Min. Co. v. Croesus Min. Co.*, 2 Nev. 168, 180, 90 Am. Dec. 526, and the monographic note to *Marshall v. Palmer*, 50 Am. St. Rep. 839-846. As to mesne profits, one tenant can probably recover only the proportion corresponding to his interest: *Brown v. Warren*, 16 Nev. 228; but where all join in a lease reserving a common rent, all may join in one action on the lease or in one distress for rent; and until notice from one that his share must be paid to himself, any of them may receive and give a valid receipt for the entire rent: *Swint v. McCalmont Oil Co.*, 184 Pa. St. 202, 63 Am. St. Rep. 791, 38 Atl. 1021.

HATHAWAY v. McDONALD.

[27 Wash. 659, 68 Pac. 376.]

APPEAL.—Appellants may Waive Exceptions to the Findings, and bring their case to the supreme court on errors arising upon the pleadings. (p. 890.)

PURE FOOD LAW—Title of.—It is not necessary to set forth in the title of a pure food statute the nature and character of the penalties provided. (p. 893.)

PURE FOOD LAW—Construction of.—If one section of a statute provides that the dairy commissioner may seize any article whose sale is prohibited by the act, and another section prohibits the manufacture or sale of process butter unless plainly marked, the commissioner may seize such butter when kept in violation of law. (pp. 893, 894.)

PURE FOOD LAW—Interstate Commerce.—A statute prohibiting the manufacture and sale of process butter, unless marked "Renovated Butter," does not, in its application to foreign products, contravene the commerce clause of the federal constitution. (pp. 894, 897.)

Horace Kimball, prosecuting attorney, and Miles Poindexter, for the appellants.

W. J. Thayer, for the respondents.

600 DUNBAR, J. Respondents sued in replevin to recover a quantity of process or renovated butter which had been seized by the appellant, E. A. McDonald, in his capacity as state dairy commissioner. Appellants demurred to the complaint, which demurrer was overruled. Appellants then answered, respondents demurred to the answer, which demurrer was sustained, and thereupon, after the taking of evidence, and a trial by the court, a jury being waived, final judgment was rendered against the appellants for said process butter, for one hundred and eighty-one dollars and seventy-five cents, with interest, as damages, and for costs and disbursements. Appellants have appealed from said final judgment, and assign as error the order overruling the demurrer to the complaint, and also the order sustaining the demurrer to the answer.

The respondents move to dismiss the appellants' appeal herein on the ground that judgment was rendered in favor of respondents upon findings of fact and conclusions of law made by the court, and that no exceptions were ever taken by the appellants, or any of them, to said findings and conclusions. But the errors assigned by appellants arise upon the pleadings, and, it is alleged, consist in overruling the demurrer to the complaint, and in sustaining the demurrer to the answer. The appellants have a right to assign any error which they see fit, for the consideration of this court; and if they desire to waive any exceptions to the findings of fact, and to bring their case here 601 upon errors arising upon the pleadings, they certainly have a right to do so. The motion will be overruled.

Chapter 43 of the Laws of Washington of 1899 (page 56), in an act entitled "An act regulating the manufacture of dairy products, to prevent deception or fraud in the sale of the same or imitation thereof, providing for the appointment of a dairy commissioner and defining his duties," etc., among other things, provides, in section 28, as follows: "Possession by any person or firm of an article or substance the sale of which is prohibited by this act shall be considered prima facie evidence that the same is kept by such person or firm in violation of the provisions of this act, and the commissioner shall be authorized to seize upon and take possession of such articles or substances, and upon the order of any court which has jurisdic-

tion thereof, he shall sell the same for any purpose other than to be used for food, the proceeds to be paid to the state treasurer and placed to the credit of the general fund."

Section 30 is as follows: "No person, firm or corporation shall manufacture, sell or offer for sale, or have in his possession with intent to sell, butter known as process butter, unless the package in which the butter is sold has marked on the side of it the words 'Renovated Butter' in capital letters one inch high and one-half inch wide with ink which is not easily removed; provided, that it shall be unlawful for any retailer to sell said butter and unless a card is displayed on the package from which he is selling butter with the following words printed thereon, so that it may be easily read by the purchaser 'Renovated Butter,' or if it is sold in packages on which a wrapper is used, the words 'Renovated Butter' shall be plainly printed on each and every wrapper; provided, further, that all process butter shipped from other states shall be subject to the same regulations as provided in this section. Whoever violates the provisions ⁶⁰² of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be fined for each and every offense not less than twenty-five dollars (\$25) nor more than one hundred dollars (\$100), or by imprisonment for not less than one month or more than six months, or by both such fine and imprisonment."

The complaint alleges, among other things, that the plaintiffs were copartners doing business under the firm name of Hathaway & Co., were residents of the state of Iowa, and were engaged in said state in the manufacture of butter, and the selling and shipping thereof into various states of the Union from said state of Iowa; that on the first day of October, 1900, they were the owners and in possession of about three hundred pounds of butter at their place of business in the state of Iowa, which said butter was shipped in original packages to the city of Spokane, Washington, consigned to one Brown, a resident of the city of Spokane; that said McDonald is dairy commissioner of the state of Washington, and the said dairy commissioner, assuming to act under the provisions of chapter 43 of the Session Laws of the state of Washington for the year 1899, took possession of all said butter, without notice to, or the knowledge and consent of, said plaintiffs, and delivered said butter to said defendant Edgar H. Stanton to keep and hold the same for said dairy commissioner, and that said Stanton now holds said butter, and that plaintiffs demanded

possession of same from each of the defendants, and they have failed and refused the possession thereof to plaintiffs; that on October 15th said dairy commissioner instituted an alleged proceeding in said court, and obtained from one of the judges thereof a pretended order authorizing the sale of said butter by said dairy commissioner on November 9, 1900; that said order was made without due process of ⁶⁶³ law, without notice to plaintiffs, without giving them an opportunity to be heard, and in violation of the rights granted them by the constitution of the United States; that all of said butter is now in the original packages, and is pure, unadulterated butter, and was shipped to Spokane by plaintiffs by virtue of their rights under the interstate commerce law of the United States of America; alleging that said chapter 43, as applied to butter, and to plaintiffs' right to ship same, was unconstitutional and void; alleging the value of the butter, and the damages sustained; and praying judgment for the return of the same, or for one thousand dollars, the value thereof. The answer alleged that the order of the court referred to in the complaint was duly made on the fifteenth day of October, 1900, and directed the sale of said butter by the said E. A. McDonald, as said dairy commissioner, on the ninth day of November, 1900, to the highest bidder, and directed the said dairy commissioner to immediately deposit in the United States postoffice in the city of Spokane a copy of the said order, and the petition upon which the same was based, duly certified, etc., directed to the said Hathaway & Co., at their postoffice address in Sioux City, Iowa; that the order was made upon a written petition of said E. A. McDonald, and that, in accordance with the directions of said order, said McDonald, on the fifteenth day of October, 1900, notified said E. J. Hathaway & Co., by mail, in the manner directed as aforesaid; alleges that the so-called butter seized by said defendant was not pure, unadulterated butter, but was what is and then was known as "process" butter, also known as "renovated" butter, and consisted of old, rancid, and putrid cow butter, which had been treated by a certain process, with heat and chemicals, by which the rancid taste and smell were removed therefrom, and ⁶⁶⁴ the same was artificially colored so as to exactly resemble pure and fresh creamery butter, so closely as to escape detection, except upon an expert chemical analysis of the same; that at the time of the seizure aforesaid the said Hathaway & Co. were offering the said process butter for sale, and intended to sell the same to one R. Brown, at

wholesale, in the packages in which the same was then contained, and the same was then in the county of Spokane, state of Washington, and neither the said packages, nor any of them, had marked upon their side, nor at all, the words "Renovated Butter," in capital letters one inch high and one-half inch wide, with ink which is not easily removed, nor in any letters, nor at all; nor was there upon the said butter, nor any of it, at any place, nor upon any wrapper on or about the same, the words "Renovated Butter," marked or printed in any manner whatever; nor was there on or about the said packages, nor the said butter, nor any of the same, any card or cards with the words "Renovated Butter" printed or written thereon; alleges the wrongful detention of the butter; and asks for a judgment in defendant's favor. A demurrer was introduced to this answer on the ground that the affirmative allegations did not constitute any defense to the complaint. This demurrer was sustained. The court sustained the demurrer on the ground that the butter was pure and unadulterated, but that it was what is known as "process," and that the plaintiffs had a right to ship the same into the state of Washington under the interstate commerce law of the United States of America, and under the provisions of the constitution of the United States, and particularly under section 8 of article 1 thereof, because said butter was an article of commerce.

There are two propositions to be discussed in this case: 1. Does the statute quoted purport to authorize the ⁶³⁵ seizure of process butter? And 2. If it does so authorize the seizure, is the statute constitutional?

The first contention of the respondents is that the title to the act does not cover provisions for the confiscation of property. But we think an announcement that an act is an act regulating the manufacture of dairy products, to prevent deception or fraud in the sale of the same, or imitation thereof, or providing for the appointment of a dairy commissioner, and defining his duties, and providing penalties for violation of this law, is entirely sufficient to justify the provisions of sections 28 and 30 of the Laws of 1899, page 66. It is not feasible, nor is it required by any judicial construction, to set forth in the title of the act the nature and character of penalties provided for. It is also contended that there is nothing in the act which assumes to provide for the seizure of process butter, but that all that is intended is to fine the violator of the law, in relation to selling process butter without marking

it as the law directs, in a sum of not less than twenty-five dollars nor more than one hundred dollars, or by imprisonment for not less than one month nor more than six months, or by both such fine and imprisonment. But the statute, to our minds, is so plain that it is difficult to base an argument in support of the fact that sections 28 and 30, construed together, provide for the seizure of renovated butter, for section 28 provides that possession by any person or firm of an article, the sale of which is prohibited by this act, shall be considered *prima facie* evidence that the same is kept by such person or firm in violation of the provisions of this act, and that the commissioner shall be authorized to seize upon and take possession of such article, etc.; and section 30, which is a part of the act as much as 28, provides the prohibition of the sale of renovated butter, excepting under certain circumstances. But certain ~~one~~ it is that renovated butter, such as is described in the answer, or renovated butter that has not the words "Renovated Butter" printed thereon, is prohibited by section 30. The only reasonable construction that can be placed upon the two sections is just what the section says—that the possession of an article the sale of which is prohibited subjects the same to seizure.

The second position of the respondents is that, butter being a recognized article of commerce, no state has the right to interfere with, or even to regulate in any manner, the transportation or sale of it, until such time as the articles have been sold or delivered to a citizen of this state, and become a part of the mass of property of the state, and that, inasmuch as this butter was sent to this state in unbroken packages, it falls within the provisions of section 8, article 1, of the constitution, providing, in substance, that Congress shall regulate commerce among the different states. This statute is not intended to, and does not, conflict with section 8 of article 1 of the constitution, which provides that Congress shall have power, among other things, to regulate commerce with foreign states and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers"; but it falls within the powers reserved by the states, and not delegated to the United States by the constitution, viz., the police power, which is an inherent power in every state by reason of its sovereignty, and the power which it is universally conceded extends to the protection of the lives and health of the citizens, and to the preservation of good order and the public morals. The state cannot

be divested, nor can it divest itself, of this power, because it is inalienable and necessary for the very existence of the state. There is no attempt by this law to interfere with the commerce ⁶⁸⁷ between the states, nor to discriminate, as in many of the cases cited by respondents, between the rights of the citizens of different states to sell commodities of commerce by placing burdens upon one class which another class was relieved of. Nor is there any attempt here to prohibit the sale of process butter. The only attempt is to prohibit the dealers in such butter, whether they be residents of this or a sister state, from perpetrating a fraud in the sale of such commodity; and such prohibition is not only the right, but the duty, of the state, to be exercised under its conceded power to make laws for the protection of the property and welfare of its citizens, and for the promotion of good order and public morals. The case most strongly relied upon by respondents in support of their contention is *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. Rep. 681. This was an action of replevin of sundry kegs and cases of beer, begun in the inferior court of the state of Iowa against a constable of Lee county, Iowa, who had seized them under a search-warrant issued by a justice of the peace pursuant to the statutes of Iowa, which prohibit the sale or keeping for sale, or the manufacture for sale, of any intoxicating liquor, including malt liquor, for any purpose whatever, except for medicinal, pharmaceutical, chemical, or sacramental purposes; and it was held by the supreme court of the United States that the law, as applied to a sale by the importer, and in the original packages or kegs, unbroken and unopened, of such liquors manufactured in and brought from another state, was unconstitutional and void, as repugnant to the clause of the constitution granting to Congress the power to regulate commerce with foreign nations and among the several states. But it will be noted that in this case there is no question of fraud, such as there is in the case at bar, ⁶⁸⁸ and in many of the cases cited by respondents this distinction is kept in view. The supreme court in the case just cited held that beer was a universally recognized article of commerce, and that, the Congress of the United States having a right to regulate such articles, the state could not constitutionally pass a law which in any way infringed the right of Congress; and it was urged that it was evidently the intention of Congress that it should be the exclusive regulator of such commodities. A strong dissenting opinion was filed by three of the judges in this case,

and, as showing the opinion of Congress on the question of its own intention, it may be noted that since that time Congress has amended the law in that respect so that, if the question should come up now under the statute of Iowa as it then existed, the ruling would of necessity be different. But the identical question here discussed was passed upon by the supreme court of the United States in a later case, viz., *Plumley v. Massachusetts*, 155 U. S. 461, 15 Sup. Ct. Rep. 154, where it was held that the statute of Massachusetts of March 10, 1891 (Mass. Stata. 1891, c. 58, p. 165), to prevent deception in the manufacture and sale of imitation butter or oleomargarine, artificially colored so as to cause it to look like yellow butter, and brought into Massachusetts, is not in conflict with the clause of the constitution of the United States investing Congress with power to regulate commerce among the several states; and the court, in passing upon that question, used the following language: "It will be observed that the statute of Massachusetts which is alleged to be repugnant to the commerce clause of the constitution does not prohibit the manufacture or sale of all oleomargarine, but only such as is colored in imitation of yellow butter produced from pure unadulterated milk or cream of such milk. If free from coloration ~~and~~ or ingredient that 'causes it to look like butter,' the right to sell it 'in a separate and distinct form, and in such manner as will advise the consumer of its real character,' is neither restricted nor prohibited. It appears in this case that oleomargarine, in its natural condition, is of 'a light yellowish color,' and that the article sold by the accused was artificially colored 'in imitation of yellow butter.' Now, the real object of coloring oleomargarine so as to make it look like genuine butter is that it may appear to be what it is not, and thus induce unwary purchasers, who do not closely scrutinize the label upon the package in which it is contained, to buy it as and for butter produced from unadulterated milk or cream from such milk. The suggestion that oleomargarine is artificially colored so as to render it more palatable and attractive can only mean that customers are deluded, by such coloration, into believing that they are getting genuine butter. If anyone thinks that oleomargarine, not artificially colored so as to cause it to look like butter, is as palatable or as wholesome for purposes of food as pure butter, he is, as already observed, at liberty under the statute of Massachusetts to manufacture it in that state or to sell it there in such manner as to inform the customer of its real character. He is only forbidden to practice, in such

matters, a fraud upon the general public. The statute seeks to suppress false pretenses and to promote fair dealing in the sale of an article of food. It compels the sale of oleomargarine for what it really is, by preventing its sale for what it is not. Can it be that the constitution of the United States secures to anyone the privilege of manufacturing and selling an article of food in such manner as to induce the mass of people to believe that they are buying something which, in fact, is wholly different from that which is offered for sale? Does the freedom of commerce among the states demand a recognition of the right to practice a deception upon the public in the sale of any articles, even those that may have become the subject of trade in different parts of the country?"

670 The language used by the learned court in this case might appropriately be applied to the case at bar, for process butter, under our statute, is not prohibited, but the intention of the statute is to prohibit fraudulently selling process butter for fresh creamery butter. These laws are what is known in common parlance as "pure food laws." They are in the interest of health, cleanliness, and good morals, and universally upheld when not substantially infringing upon the powers of Congress; and no case, we think, has gone so far as to hold that the police power of the state cannot be exercised for the prevention of fraud in matters of this kind without being subjected to the charge of impinging upon constitutional rights.

We are not certain that there was enough in the complaint to subject it to the demurrer interposed, but the answer stated a cause for defense under the statute, and the demurrer was wrongly sustained. The judgment will be reversed, with instructions to overrule the demurrer to the answer.

Reavis, C. J., and White, Hadley, Anders, and Mount, JJ., concur.

Pure Food Law.—A statute prohibiting the manufacture and sale of any substance "made in imitation of yellow butter," and not made "wholly of cream or milk," is constitutional, though intended to prohibit the sale of such products imported from other states and sold in the original packages: *State v. Rogers*, 95 Me. 94, 49 Atl. 564, 85 Am. St. Rep. 395, and note. See, in this connection, *State v. Zophy*, 14 S. Dak. 119, 86 Am. St. Rep. 741, 84 N. W. 391; *People v. Biesecker*, 169 N. Y. 53, 88 Am. St. Rep. 534, 61 N. E. 990.

The Titles of Statutes, with respect to their sufficiency under the constitutional requirements, are considered in the monographic notes to *Robel v. People*, 64 Am. St. Rep. 70-107; *Crookston v. County Commrs.*, 79 Am. St. Rep. 456-486; *Lewis v. Dunn*, 86 Am. St. Rep. 267-279.

CASES

IN THE

SUPREME COURT

OF

WISCONSIN.

DIANA SHOOTING CLUB v. LAMOREUX.

[114 Wis. 44, 89 N. W. 880.]

CONSTITUTIONAL LAW—Title of Statute.—The title of an act should be liberally construed, and not be condemned as insufficient to constitutionally suggest those things found in the *body* of the act, unless, giving thereto the largest scope which reason will permit, something is found therein which is neither within its literal meaning nor its spirit, nor germane thereto. (p. 900.)

CONSTITUTIONAL LAW—Title of Statute.—Every subject which the court can see would or might facilitate the accomplishment of the primary purpose named in the title of an act is germane thereto, and may be considered as constitutionally suggested by the expression of such primary purpose. (p. 900.)

CONSTITUTIONAL LAW—Title of Act.—The constitution requires the subject of an act to be expressed in its title, but leaves the mode of expressing it wholly to the discretion of the legislature. (p. 901.)

CONSTITUTIONAL LAW—Title of Act—Primary Purpose. The statement of the primary object in the title of an act as being the creation of a corporation for manufacturing purposes suggests, as germane thereto, and as part of the expressed purpose, authority to acquire and maintain a dam to create power for the use of the corporation, to acquire lands affected by the backwater of such dam, and authority in the owners of such lands to sell them to the corporation. (p. 904.)

PUBLIC LANDS.—An artificial lake maintained on lands the title of which is in the state does not stamp on such lands the same character and trusts as if they were covered by a natural lake, unless the artificial lake is continued for a time sufficient to make it a natural lake by prescription. (pp. 905, 906.)

PUBLIC LAND—Swamp Lands.—Decisions by the land department of the general government, as to whether lands were uplands or swamp lands within the meaning of a national swamp land act at the time it took effect, are conclusive in all courts and as to all parties, except a claimant by paramount title. (p. 906.)

PUBLIC LANDS—Swamp Lands—Title to, when Vests in State.—A national swamp land act vests in the state, as of the date it takes effect, the title to all lands determined by the general land

department of the United States to be affected thereby. Such lands are thereafter segregated from the remainder of the public domain and vested in the state, whether or not they were at the time of the passage of such act artificially covered by navigable water, by trespassers upon the public lands. (p. 907.)

WATERS AND WATERCOURSES—Statute of Limitations.—Although an artificial condition of water may, by prescriptive right, become a natural condition as regards public rights, yet this is not so in the absence of elements necessary to change the title to the lands by operation of the statute of limitations. (p. 907.)

TRESPASS.—Any Wrongful Intrusion upon the right of another is both an injury and a damage, and is a proper subject for legal redress. (p. 908.)

TRESPASS—Hunting.—Any wrongful intrusion upon the right to use land for fishing and hunting is actionable, no matter as to the amount of damages caused by such invasion. (p. 908.)

TRESPASS.—State License to Hunt confers no right upon the holder to go upon private lands without the permission of the owner. (p. 908.)

Action to recover damages for trespassing upon an exclusive right to hunt and fish on certain lands, the title to which was put in issue, the defendant claiming that the lands were formerly the bed of a lake, and that the state had never parted with the title thereto. Judgment dismissing the complaint with costs. Plaintiff appealed.

J. E. Malone and J. B. Doe, for the appellant.

Lamoreux & Husting and E. Merton, for the respondent.

⁴⁷ **MARSHALL, J.** The first question which naturally engages our attention in considering the assignments of error upon this appeal is, Did the court err in holding that chapter 454, P. & L. Laws of 1867, is unconstitutional? Appellant depends entirely upon the validity of that act to make out a paper title to that which respondent is charged with having violated. The trial court decided that the act is invalid because it violates section 18, article 4, of the constitution, which provides: "No private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title."

To sustain that decision, much reliance is placed on *Durkee v. Janesville*, 26 Wis. 697, where it was held that a local act ⁴⁸ violates the constitutional limitation mentioned unless its title refers to the locality to which the act applies. The infirmity in that position is in the fact that the act in question is not a local, but is a private, act. There have been so many decisions on the subject of the scope of the constitutional provision in question that no new light can be easily, if at all,

shed thereon. Some rules have been deduced from the various decisions which furnish pretty safe guides to go by, and to those we will refer.

It has been repeatedly held that the title of an act should be liberally construed; that it should not be condemned as insufficient to constitutionally suggest those things found in the body of the act unless, giving thereto the largest scope which reason will permit, something is found therein which is neither within its literal meaning nor its spirit, nor germane thereto. Courts cannot sit in judgment upon the work of the legislature and decide one of its acts unconstitutional, merely because the title thereof is not as comprehensive as it might have been made. Within all reasonable boundaries, legislative discretion in that field cannot be rightfully interfered with. This court has said: "Titles of acts should be liberally construed, and acts will be upheld if they substantially comply with this section, though their titles do not express their subjects as fully and unequivocally as possible": *Mills v. Charleston*, 29 Wis. 400, 9 Am. Rep. 578.

Any number of provisions, all relating to a single object, including all the necessary or reasonable details thereof, may be covered by a title in such general terms as to fairly indicate such subject, the unity of the subject being taken as including within its scope all the details provided to effect the single legislative purpose: *Milwaukee Co. v. Isenring*, 109 Wis. 9, 22, 85 N. W. 131. The court of appeals of New York, speaking on the same subject, held that neither that court nor any other has said anything justifying the position that the various methods adopted in a bill to carry out its general design ^{as} must be enacted by several bills in order to comply with the constitutional limitation; that courts cannot legislate, nor dictate legislation, nor have any concern with questions of mere propriety or wisdom: *Matter of Mayer*, 50 N. Y. 504, 508. Every subject which the court can see would or might facilitate the accomplishment of the primary purpose named in the title of an act is germane thereto, and may be considered as constitutionally suggested by the expression of such primary purpose: *People v. Briggs*, 50 N. Y. 553, 564. "The constitution does not require the title of a private or local bill to disclose or shadow forth the character of the proposed legislation, its full scope and purpose, and to make known the several interests which may be directly or indirectly affected by it so as to attract attention and give notice of all that is to

be accomplished by the proposed act." "The constitution requires the subject of the act to be expressed in the title, but leaves the mode of expressing it wholly to the discretion of the legislature": *People v. Banks*, 67 N. Y. 568, 572. The supreme court of South Carolina is in line with the foregoing. It said, in *Connor v. Green Pond etc. Ry. Co.*, 23 S. C. 427, 435: "When a question under this clause of the constitution is presented for adjudication, we are bound to take a liberal and enlarged view, and if practicable bring the legislation which is assailed as unconstitutional within the limits prescribed by the supreme law of the land."

"Everything which facilitates the subject or object of an act is covered by the expression of the subject." The supreme court of the United States, in harmony with the decisions cited, holds that "all the provisions of an act which are appropriate to carry out the expressed object thereof are sufficiently indicated by the expression of such object, and are in a constitutional sense included therein": *Mahomet v. Quackenbush*, 117 U. S. 508, 511, 6 Sup. Ct. Rep. 858.

⁵⁰ The foregoing sufficiently shows the extent to which courts have gone in resolving all reasonable doubts in favor of legislative power to the end that it may be in fact what the framers of the constitution intended it should be, independent and unimpeachable, within the broadest limits which reason can ascribe to constitutional limitations, having regard to the letter as well as the spirit thereof, the persons concerned in legislating being left, within such limitations, responsible for their conduct solely to the people. It is not improbable that the constitutional purpose in respect to the subject under discussion has in a measure failed because of the conservatism of that branch of our governmental system which is clothed with the duty of defining the limits set by the constitution for legislative power. If so, in that we have a demonstration that the rights of the people stand in no danger of judicial encroachments upon legislative and executive power. If the people desire to have the hands of such branches of the government tied more closely than the courts have been able to discover has been accomplished by the constitution as framed, the way is open to do so by further and more definite constitutional limitations. The court performs its full duty when it resolves all reasonable doubts against constitutional limitations upon legislative power, and unhesitatingly and vigorously enforces the restraints which are found to have been

embodied by the people in their organic act of government. In that the court maintains such limitation in letter and spirit so far as judicial rules will permit, and it must be assumed that such rules were well understood when the constitution was framed and courts were created, charged with the office of construing it.

Probably as comprehensive a rule as can be found stated in the books, for testing the sufficiency of a title to a private or local legislative act, is the one deduced from the authorities by the New York court of appeals and approved in *Milwaukee Co. v. Isenring*, 109 Wis. 9, 85 N. W. 131. When one, reading a bill ⁵¹ with the full scope of the title thereof in mind, comes upon provisions which he could not reasonably have anticipated because of their being in no way suggested by the title in any reasonable view of it, they are not constitutionally covered thereby. But in applying that rule, this other rule, which has been universally adopted, must be kept in mind: The statement of a subject includes, by reasonable inference, all those things which will or may facilitate the accomplishment thereof: *People v. Sutphin*, 166 N. Y. 163, 59 N. E. 770; *Hope v. Gainesville*, 72 Ga. 246. The extent to which the courts have gone in applying those principles is indicated by the following. An act entitled "An act to incorporate a railway company," specifying the name thereof, has been repeatedly held to include all provisions which may be reasonably considered to have been designed to aid in forming the corporation and accomplishing the object thereof, including a grant of power to a municipal corporation to take stock in the company, to issue municipal bonds in payment thereof, and all necessary provisions in regard to the details of taxation to raise money to pay the principal and interest on such bonds: *Hope v. Gainesville*, 72 Ga. 246; *Mahomet v. Quackenbush*, 117 U. S. 508, 6 Sup. Ct. Rep. 858; *Schuyler Co. v. People*, 25 Ill. 181, 183. An act entitled "An act to incorporate the Fireman's Benevolent Association and for other purposes," was held to constitutionally suggest a provision requiring the agents of all foreign insurance companies doing business at the home of the corporation to pay two per cent of all premiums received by them to the association treasury for its use: *Fireman's Ben. Assn. v. Lounsbury*, 21 Ill. 511, 74 Am. Dec. 115. An act entitled "An act to amend the charter of Covington and Cincinnati Bridge Company," was held to suggest the subject of corporate power on the part of the bridge company to sell a

part of its corporate stock to the city of Covington, and the subject of municipal power on the part of such city to take the stock, issue its corporate bonds in payment ⁵² thereof, and levy and collect taxes from time to time to meet the principal of and interest on such bonds: *Phillips v. Covington etc. Bridge Co.*, 2 Met. (Ky.) 219. An act entitled "An act to incorporate the Northwestern University" was held to include, as germane to the primary subject so expressed, a prohibition of the sale of spirituous liquors within four miles of the location of the college: *O'Leary v. Cook Co.*, 28 Ill. 534. An act entitled "An act for the more uniform mode of doing township business" was said to include the subject of organizing new towns: *Clinton v. Draper*, 14 Ind. 295. An act entitled "An act to regulate proceedings in the county court" was said to suggest provisions regarding proceedings in the appellate court in the hearing and disposition of cases appealed from the county court: *Murphey v. Menard*, 11 Tex. 673.

Many more illustrations might be added to those we have given. Some mentioned seem to be rather extreme applications of the very liberal rule that everything found in the body of a legislative act should be deemed included in the title expressing a single subject, which may be reasonably considered as liable to facilitate the primary object of the enactment so expressed. It is not necessary for the purpose of this case to go so far as many of the courts have gone. We should hesitate long before doing so, as it would leave the constitutional limitation under consideration without valuable force. The spirit of the constitutional restraint can be made effective and still leave the legislature sufficiently free in the exercise of its discretionary power that it will not be embarrassed in any legitimate effort to perform its duties. It is reasonable to hold that the statement of a subject, by reasonable inference, states the details thereof, and that such details may be as broad as the purpose suggested by the subject in any reasonable view thereof, and are in a constitutional sense suggested thereby, so that no one need reasonably be astonished at coming upon any one of them in reading an act in ⁵³ which they are included, the reader having in mind the full scope of the primary object of the enactment as expressed in its title. That rule carries out the constitutional requirement that the subject of an act shall be single and be stated in the title, leaving the legislature to exercise a broad discretionary power as to the mode of expressing it.

The subject of the act before us is the incorporation of a manufacturing company. That subject suggests at once a manufacturing business as the object of creating the corporation. It also implies, necessarily, a requirement for motive power and means of creating it, as by water, and, as necessary thereto, the maintenance of a dam; and to that end the right to acquire and maintain a dam. That suggests the necessity of acquiring the title to lands affected by the backwater of the dam, and power of the owner of such lands to sell the same to the corporation and to preserve existing conditions necessary to the exercise of such power. All of those matters are included in the act in question. That learned trial court supposed that the power granted to the corporation to maintain a dam, and to acquire from the state title to the lands covered by the backwater of the dam, and authority to the state to sell the land to the corporation and to retain the title thereto till that power could be exercised, were, in whole or in part, not germane to the mere creation of the corporation, hence that the act covered more than one subject and violated the constitution. Hence the act was condemned as invalid. Enough has been said to clearly show, in the light of the settled construction of the constitutional provision in question, that such decision cannot be sustained.

What has been said entirely relieves appellant's case from the supposed infirmity of there being no valid law creating the state's grantee of the lands in question and giving the state authority to convey the lands to such grantee if, under any circumstances, it could so deal therewith. Chapter 454 of the P. & L. Laws of 1867, creating the Mechanics' Union Manufacturing ⁵⁴ Company, is a constitutional enactment. It gave to the appropriate executive and administrative officers of the state authority to convey to such corporation whatever proprietary title the state had to the lands referred to therein. We do not deem it necessary to consider the history of the passage of the act through the legislature. The wisdom of the measure and those things in respect thereto indicating that the legislature did not properly guard the interests of the state, which, by the industry of counsel, were brought to the attention of the trial court, do not concern the merits of the case, since they involve no constitutional question.

The next question to be considered is, What was the nature of the state's title to the lands covered by the waters of Horicon lake, so called, at the time of the attempted conveyance

thereof pursuant to the act of 1867? The learned trial court supposed it was the same as that to any land covered by the waters of a natural navigable lake, and that the numerous decisions of this court to the effect that the state has no proprietary right in such lands, no right which it can sell as state property, rule the case. True, the navigable waters of the state and the lands upon which they rest, as the same existed when the state was admitted into the Union, speaking only of natural bodies of water, became, at the instant of such admission, vested in the state for those public purposes incident to navigable waters at common law, and the state is powerless to change its relation thereto so far as the preservation of such relation is necessary to the trust, and it has not been changed at all as regards the beds of navigable lakes: *Ne-pee-nauk Club v. Wilson*, 96 Wis. 290, 71 N. W. 661; *Prieue v. Wisconsin State etc. Co.*, 93 Wis. 534, 67 N. W. 918; *Willow River Club v. Wade*, 100 Wis. 86, 103, 76 N. W. 273; *Illinois S. Co. v. Pilot*, 109 Wis. 418, 426, 83 Am. St. Rep. 905, 84 N. W. 855, 85 N. W. 402. True, also, if an artificial lake is created, or artificial level of a natural lake is caused by the erection of a dam, and such condition is allowed to exist adversely ⁵⁵ for the full statutory period necessary to change the ownership of the land affected thereby, the former owner thereof cannot thereafter object to a continuance of such condition. By operation of the statute of limitations the artificial condition is thus stamped with the character of a natural condition, and the title to the lands covered by the waters of the lake is deemed to have passed from private ownership to the same trust as that of lands covered by the waters of natural navigable lakes. The state, and private owners, as well, of lands affected by the artificial condition, may enforce the maintenance of that condition. No one can enforce its discontinuance: *Smith v. Youmans*, 96 Wis. 103, 65 Am. St. Rep. 30, 70 N. W. 1115; *Mendota Club v. Anderson*, 101 Wis. 479, 78 N. W. 185; *Pewaukee v. Savoy*, 103 Wis. 271, 276, 74 Am. St. Rep. 850, 79 N. W. 436. But we are unable to see how those principles can be applied to the facts of this case. Counsel suggest, as the turning point in that regard, the following: "Were the premises in question submerged lands in the year 1867, at the date of the alleged patent to the Mechanics' Union Manufacturing Company, and had they been such submerged lands for upward of twenty years within the meaning of the decisions of this court,

so that the title to the same became vested in the state in trust?"

In presenting that proposition for consideration counsel seem to assume that if the lands, for a period of twenty years prior to the making of the patent in 1867, were artificially submerged, the waters covering the same being navigable during such period, it must be answered in their favor, entirely overlooking the fact that the submerged condition must have existed under such circumstances as to change the title thereto from a proprietary to a mere trust character by the operation of the statute of limitations before it was interrupted, else no lake was created by prescription; that the mere fact of the existence of the artificial lake for twenty years does not solve the controversy. It stands admitted that the territory ⁵⁶ in question was covered by the United States land surveys long prior to the creation of the lake by the building of the dam across Rock river. The government plats (which we may properly refer to, even though not in evidence) show such to be the fact. While the dam was built and the lands were covered by water in 1846, the title remained in the United States till the passage of the swamp land act of 1850, and was of course not affected by any statute of limitations. The statute began to operate against the state at the earliest date it acquired its title. Twenty years did not elapse thereafter till the patent was made conveying such title under the act of 1867, and the restoration of the lands to their former condition was accomplished by the destruction of the dam. The conclusion is irresistible, under those circumstances, that the lake created by the dam did not, prior to its discontinuance, become a natural lake by prescription. In 1850 the land was part of the surveyed public domain of the United States, unaffected by the artificial condition created by the dam previously built. If the lands were swamp lands, the title thereto, by the swamp land act, passed to the state as state property. While the decision of the land department of the general government as to whether lands were or were not covered by navigable waters at any particular time does not foreclose that question, as to whether lands were uplands or swamp lands within the meaning of the swamp land act at the time it took effect, the decision of such department is conclusive in all courts and as to all parties except a claimant by paramount title: *Quinby v. Conlan*, 104 U. S. 420. The United States land department regularly approved the lands in question as swamp lands within

the meaning of the act of 1850, and the title of the state thereby became perfect as of the date such act took effect. That title was just as perfect when the patent was made under the state act of 1867, to the corporation under which plaintiff claims, as it was on the day it became vested in the state. The statute of limitations had ⁵⁷ not then run against the state. It was interrupted before the title to the land became affected thereby. Therefore, the corporation, grantee of the state, obtained a perfect title to the lands described in its patent.

Counsel for respondent call attention to the ruling of the land department that the conditions existing when the swamp land act took effect must be looked to to determine whether the title to the land in question passed to the state thereunder, and contend, as we understand them, that the same rule should govern in determining whether the state, when it was admitted into the Union, took the title to the land as territory under navigable waters. It is sufficient to say on that subject that the rule to which counsel refer, citing an opinion by the commissioner of the general land office (*In re State of California*, 14 Land Dec. Dep. Int. 255), applies only to natural bodies of water, not to artificial lakes created by trespassing upon the public domain. The lands in question, as stated, were part of the public domain of the United States when they were surveyed by its authority. The artificial condition thereafter adversely created was properly treated by the general land department as ineffectual to change that condition, turning the land into the subject of a trust for a state to be formed. After the passage of the swamp land act it devolved upon the general land department to decide what part of the public domain was affected thereby, transferring the title thereto to the states. The territory in question was in due form approved as being so affected, and respondent is in no position to impeach that decision.

What has been said removes all the substantial support for the judgment appealed from, upon which the trial court rested it. There is a finding that appellant was never in the exclusive possession of the land. Inasmuch as its right does not rest on evidence of mere possession, but is based on a good ⁵⁸ paper title to the exclusive use of the land for all purposes except cutting grass and pasturing stock, a violation thereof by respondent was unquestionably actionable: *Stephenson v. Wilson*, 37 Wis. 482.

Respondent's counsel insist that appellant, at best, was a

mere licensee, hence could not maintain this action. In the first place, appellant's right was not that of a mere licensee. It possessed a grant for a term of years, created by a written conveyance, of the exclusive right to the premises for some purposes, as before indicated. That created the relation of landlord and tenant between appellant and the holder of the legal title: 1 Wood on Landlord and Tenant, 2d ed., sec. 223. In the second place, it makes no difference what the exact nature of appellant's interest in the premises was, since the evidence is conclusive that it was wrongfully violated by respondent. From such violation a cause of action accrued to appellant to recover such damages as were proximately caused thereby. In contemplation of law, every violation by one person of a legal right of another, impairing to any extent, however slight, the enjoyment of that right, is an actionable wrong: Sutherland on Damages, sec. 9. The constitution guarantees a remedy in all such cases: Const., art. 1, sec. 9. The amount of the damages suffered or recoverable, whether substantial or merely nominal, is no test of the right to a judicial remedy to redress a wrong. Counsel for respondent seem to think that no recovery can be had in this case unless appellant makes out a case satisfying all the essentials of a common-law action of *quare clausum fregit*. While it seems that such essentials were satisfied by the evidence in this case, that was not necessary. It was sufficient to show that respondent committed a hostile intrusion upon appellant's legal right to the premises in question: *Williams v. Esling*, 4 Pa. St. 486, 45 Am. Dec. 710. It was very early held that a mere wrongful intrusion by one person upon a legal right of another, regardless of the amount of the ⁵⁹ resulting damages, in contemplation of law is both an injury and a damage and is a subject for legal redress: *Weller v. Baker*, 2 Wils. 422; *Hobson v. Todd*, 4 Term Rep. 71.

It is suggested that the court ought to hold that a person may go upon the land of another to hunt or fish without permission of the latter, and without incurring any legal liability for so doing, so long as such person does not cause any substantial damage to such other's property rights. What principle of law such a doctrine could be grounded upon we are unable even to suspect. Every person has a constitutional right to the exclusive enjoyment of his own property for any purpose which does not invade the rights of another person. The mere fact that fish and game, in their natural condition, belong to

the state for the enjoyment of the whole people, and that the state may regulate the manner of such enjoyment by compelling those who desire to participate therein to take out licenses, does not militate in the slightest degree against the property rights of others. No person has a right to go upon the land of another against the latter's will, or to so intrude upon the right of such other to the exclusive use of lands for any purpose, merely because he possesses a state license to hunt. Such a license does not affect the relations of the licensee with such other in the slightest degree. A violation of the latter's rights by such person, which would be an actionable wrong if he were not armed with a state license to hunt, would be such a wrong if he were so armed. It is a mistaken notion that such a license gives the holder thereof any right whatever to trespass upon the property of others.

The evidence in this case does not show that appellant suffered any substantial damage by the wrongful conduct of respondent. Appellant did not own the grass that was tramped down. The damage caused by the wrongful conduct was merely nominal. Appellant should have been allowed upon ^{the} evidence to take judgment for nominal damages and costs.

By the Court. The judgment of the circuit court is reversed, and the cause remanded, with directions to render judgment in favor of the plaintiff in accordance with this opinion.

The Titles of Statutes in respect to their compliance with constitutional requirements are considered in the monographic notes to *Bobel v. People*, 64 Am. St. Rep. 70-107; *Crookston v. County Commrs.*, 79 Am. St. Rep. 456-486; *Lewis v. Dunne*, 86 Am. St. Rep. 267-279.

Public Lands.—The decisions of the land department as to matters within its jurisdiction ordinarily are final and conclusive: See *Bates v. Halstead*, 130 Cal. 62, 80 Am. St. Rep. 70, 62 Pac. 305; *Gage v. Gunther*, 136 Cal. 338, 68 Pac. 710, 89 Am. St. Rep. 141, and cases cited in the cross-reference note thereto. Its decision that land is agricultural, and not mineral, determines the character of the land: *German Ins. Co. v. Hayden*, 21 Colo. 127, 52 Am. St. Rep. 206, 40 Pac. 453.

The Swamp Land Act of Congress in 1850 vested title in the respective states from its date, and it included in its operation submerged lands: *Sterling v. Jackson*, 69 Mich. 488, 13 Am. St. Rep. 405, 37 N. W. 845. This position, though fortified by many decisions, is no longer defensible: *Small v. Lutz*, 41 Or. 570, 67 Pac. 421, 69 Pac. 820; *Michigan L. & L. Co. v. Rust*, 168 U. S. 589, 18 Sup. Ct. Rep. 208; *Brown v. Hitchcock*, 173 U. S. 473, 19 Sup. Ct. Rep. 485.

Hunting and Fishing.—The owner of property has the exclusive right of hunting and fishing thereon, whether it is upland or covered with water. And anyone entering thereon for sporting purposes becomes a trespasser and may be punished accordingly: See *Sterling*

v. Jackson, 69 Mich. 488, 37 N. W. 845, 13 Am. St. Rep. 405, and note; Griffith v. Holman, 23 Wash. 847, 83 Am. St. Rep. 821, 63 Pac. 239; Albright v. Cortright, 64 N. J. L. 330, 81 Am. St. Rep. 504, 45 Atl. 684. One who has, under a lease, an exclusive right of hunting upon a game preserve, may sue to enjoin hunters from trespassing thereon: Kellogg v. King, 114 Cal. 878, 55 Am. St. Rep. 74, 46 Pac. 166.

ROSSMILLER v. STATE.

[114 Wis. 169, 89 N. W. 839.]

CONSTITUTIONAL LAW—Statutory Construction.—An exposition of the meaning of a statute in the statute itself cannot be departed from by the courts, and if the legislative intent in the statute is plain, such intent must be deemed the sole purpose of the act, however unreasonable or absurd the statute may be. (p. 913.)

CONSTITUTIONAL LAW.—Ice Formed Naturally upon the public waters of the state is not state property, in a proprietary sense, so as to enable the state, under authority of a statute, to deal with it by sale made by the state, or otherwise. (pp. 914, 915.)

CONSTITUTIONAL LAW—Rights in Public Waters.—The right of every person within the state to enjoy its public waters for every legitimate purpose, including the cutting and appropriation of ice, which does not wrongfully interfere with the right of any other person to like enjoyment, subject only to such mere police regulations as the legislature may, in its wisdom, prescribe to preserve the common heritage of all, is a constitutional right of all persons within the state. (p. 915.)

NAVIGABLE WATERS—Right to Ice.—The state has no greater right to sell the ice that forms upon its navigable waters than to sell the water thereof in its liquid state, or the fish that inhabit the water, or the wild fowl that resort thereto. It can do neither. (p. 916.)

NAVIGABLE WATERS—Right to Take Ice.—Whenever the title to beds of navigable waters is in the state for public purposes, all of the incidents of public waters at common law exist, including the public right of taking ice therefrom to the same extent as the right of taking fish. (p. 919.)

NAVIGABLE WATERS of the State have substantially the incidents of tidal waters at common law. The rights of the public therein are the same, and the state cannot interfere therewith except by police regulation. (p. 919.)

NAVIGABLE WATERS—Rights to Ice.—The state has no such interest in the natural ice on its navigable waters that it can treat it as a subject for bargain or sale, or grant it away to private owners under the guise of the police power, or otherwise. It is a mere trustee of the title thereto with no power thereover except that of mere regulation to preserve the common right of all. (p. 920.)

CONSTITUTIONAL LAW—Rights in Ice.—The state can no more appropriate to itself the ice formed upon its navigable waters than one person can rightfully appropriate the property of another without his consent and pass the title by bargain and sale or other-

wise. The whole beneficial use in such ice is vested in all of the people within the state as a class, and any law invading such use is an invasion of the right to liberty and property, without due process of law. (p. 921.)

Error to review a judgment convicting plaintiff of a violation of the statute mentioned in the opinion.

Kearney, Thompson & Myers and J. L. O'Connor, for the plaintiff in error.

E. R. Hicks, attorney general, and E. N. Warner, for the defendant in error.

¹⁷⁵ MARSHALL, J. Is chapter 470 of the Laws of 1901 valid? That is the only question involved in this case. An affirmative answer would require an affirmance of the judgment, and a negative answer a reversal thereof, and a direction to the trial court to discharge the plaintiff in error.

There is no room for controversy, either as to the intent of the law-making power in the enactment here called in question, or but that both the legislative and executive idea, in placing the same on the statute book, was that it dealt with a subject of vast importance to the state. There are some striking features in the act indicating that with all the certainty of a mathematical demonstration. The severe penalties and forfeitures ¹⁷⁶ provided for, of themselves, clearly evidence the magnitude of the state interest which those concerned in the legislation supposed they were conserving. The act allows no one to cut ice on the meandered lakes of the state for shipment beyond its borders, regardless of the extent of his operations, without first giving a bond to the state in the sum of ten thousand dollars. A person who makes a false statement of the extent of his operations to the Secretary of State, whether willfully or otherwise, is made guilty of the crime of perjury and subjected to punishment therefor under the criminal laws of the state which were designed to deal with that serious offense. Any citizen of the state is armed with authority to set judicial machinery in motion in any of its circuit courts, to collect any indebtedness that may accrue to it for ice taken from its meandered lakes by any licensee. A person concerned in cutting any such ice and shipping the same out of the state, contrary to such act, regardless of his part in the operations, even though it be that of a mere employé, and regardless of whether he acts with or without knowledge that no license has been obtained to authorize such operations, and of the extent of his

in section 9. The only legitimate office of the section is to give to the act a clear legislative construction, binding on the courts. That is, strictly within the power of the legislature to do. That is, the legislature may embody in an act an exposition thereof, setting forth the meaning of the language used, and thereby preclude courts from considering the subject further, perhaps, than to determine whether such meaning can reasonably be ascribed to their language: *Jones v. Surprise*, 64 N. H. 243, 245, 9 Atl. 384; *State v. Schlenker*, 112 Iowa, 642, 84 Am. St. Rep. 360, 84 N. W. 698. That must be the law, since the only office of judicial construction of a law, as before indicated, is to enable the court to see the language thereof in the same light the legislature did. When it speaks plainly on that subject in the law itself, all judicial rules for construction are set aside or rendered useless. If we were able to pass the apparently plain meaning of the act, aided by the equally plain legislative declaration in that regard, we would yet have to pass the explicit exposition of the law made by the executive when he gave it his approval, which we may properly look to in cases of doubt, before reaching a field where any other purpose could be assigned to the enactment than to deal with ice formed on the meandered lakes of the state as its property—to sell privileges to enjoy such property, for public revenue only.

What has been said leads up to this as the vital question: Is ice, formed naturally upon the public waters of the state, state property in a proprietary sense—property which it can deal with as a private person deals with his property rights? It must be assumed without discussion that no property right was acquired by the state by the mere legislative declaration that ice formed upon meandered lakes within the boundaries ¹⁸⁰ of the state belongs to the state as property. The legislature has no such arbitrary power, under our constitutional system, as that of changing the nature of the ownership of property by its mere fiat. It can no more accomplish that result in that way than it can change the laws of nature by a legislative declaration. Ice formed on public water is the absolute property of the state, independent of any legislative assertion in that regard, or not at all. We would not for a moment indulge in the idea that any branch of the law-making power, responsible for placing upon the statute books the enactment in question, thought otherwise. The declaration as to state ownership was a mere proclamation that henceforth the state proposed to sell its ice, or give it away, according as the same was desired for domestic consumption or

shipment outside the state, it being supposed, as indicated by the executive approval of the enactment, that the fact of state ownership was not open to question. Of course, if in that there was a misconception of the law, the law remains unchanged notwithstanding. "An enactment of the legislature based on an evident misconception of what the law is will not have the effect, per se, of changing the law so as to make it accord with the misconception": *Byrd v. State*, 57 Miss. 243, 247, 34 Am. Rep. 440.

What is the real nature of the state's interest in ice formed upon its public waters, if it were not for the attitude of the law-making power as indicated, we must confess, in the light of the repeated decisions of this and other courts, would not seem to be open to serious question. As matters stand, we feel constrained to say it appears that the indications, from the origin of the state's interest in public waters and the purposes to be served thereby, and the judicial declarations in regard thereto in this and other courts, are on one side of the controversy, and the legislation is upon the other. Unless that appearance can be changed, since the proposition involved is purely of a judicial character, there can be no question ¹⁸¹ as to which view must prevail. It has been universally supposed, we venture to say, that the right of every person within the state to enjoy its public waters for every legitimate purpose, including the cutting and appropriation of ice, which does not wrongfully interfere with the right of any other person to like enjoyment, subject only to such mere police regulations as the legislature may in its wisdom prescribe to preserve the common heritage of all, is a constitutional right of all persons within the state. While the language used in speaking of the subject is sometimes restrictive, looking at the same only in the literal sense thereof, in that it points only to the people of the state, obviously the rule includes all people lawfully within the state, whether of the state, in the sense of being residents thereof, or otherwise. It has not been supposed that the state could deal with public waters, or with any other thing held upon a like trust to that of such waters, as the proprietor thereof—that any such thing could be treated in any respect as the absolute property of the state, and used for purposes of revenue. Obviously, there can be no difference between public water in a liquid condition and in the form of ice, or between water and the land covered thereby, or the fish or fowls which inhabit the same, or any of the animals *ferae naturae*, in respect to sovereign authority over the same. If one

may be dealt with as the absolute property of the state, the others may be. It follows that, if the legislation in question be valid, the right to take water from navigable lakes for shipment, though it in no way affect the character thereof for other public purposes, and the right to fish and hunt, may be subjects of sale by the state for the mere purpose of adding to the public revenues; those things which have been supposed to be public and for the individual enjoyment of all without restraint, other than by reasonable police regulations to preserve their character in that regard, things above sovereign authority to barter in as in ancient systems entirely foreign to ours, will ¹⁸² cease to have that character in fact, and our notions in regard thereto will have to be readjusted to the newly established condition—that which regards the state, not as a mere trustee for the whole people, of the subjects we have mentioned, but as the absolute owner thereof, with power to deal therewith as a private person might if he were such owner.

After the most painstaking investigation which we can give to the act under consideration, to the end that it may be sustained, if possible, we confess our inability to discover anything in reason or authority to support the idea of state ownership of ice formed on public waters. The learned attorney general, after exhausting, we must assume, the resources of his office to that end, has not been able to aid us. His printed brief and oral argument as well are implied confessions thereof, and without any reflection, we will say in passing, upon either his industry or ability in the discharge of official duty. The attorney general makes suggestions in regard to how the law might be held valid, by assuming that its purpose is other than merely to traffic in ice; but, as we view the law, we are not warranted in departing from that purpose. We will say, however, that if we could see any legislative intent to exercise police power to prevent injury to common rights by depleting navigable waters, as the court found in *Sanborn v. People's Ice Co.*, 82 Minn. 43, 83 Am. St. Rep. 401, 84 N. W. 641, cited to our attention with confidence by counsel for the state, we should hesitate before announcing that the taking of ice from a large body of navigable water could be reasonably legislated against as interfering with common rights by reducing the level of the lake. It was held in that case, in accordance with elementary principles, that the taking of ice from public waters, by anyone who can lawfully gain access thereto, is a constitutional privilege—one common to all persons; and, impliedly, that legislative power in regard thereto

extends only to such reasonable regulations as will prevent the enjoyment by one person from invading ¹⁸³ the common right of enjoyment. There is no suggestion in the opinion of the court that ice formed on public waters is a subject of state ownership—property which it can sell to replenish its treasury. The action was grounded on the right of a riparian proprietor to prevent injury to his riparian rights by a lowering of the level of the water. Two members of the court, in a vigorous dissenting opinion which indicates much study of the subject, gave as their view of the law that the right to take ice from public waters for the consumption of the takers, or for sale as an article of commerce, is common to all, and is so superior to riparian rights that the owner of the latter cannot interfere with the enjoyment of the former on the ground that it reduces the level of the water.

This reason is advanced in *Sanborn v. People's Ice Co.*, 82 Minn. 43, 83 Am. St. Rep. 401, 84 N. W. 641, for the conclusion there reached, which we are urged by counsel for defendant in error to adopt: While ice formed on public waters is common property, it is not such property for purely commercial purposes; no one has an absolute right to appropriate therefrom more than he needs for his domestic use. If that were so, it would not follow that the surplus ice belongs to the state and may be appropriated for revenue purposes. But the doctrine itself seems to be out of harmony with all well-recognized principles of public waters. As suggested in the dissenting opinion, if the privilege to take ice only entitles each person to sufficient of the common stock for his domestic needs, then the common privileges of fishing and hunting must be likewise limited. We are not aware of any such limitation. The right to take game for sale, or to take water or ice from the public stock for that purpose, has never been questioned under our system, so far as we are aware. To establish the contrary would be a most serious impairment of common rights in navigable waters. Those rights cannot be too carefully guarded. That they extend to the taking of ice for sale, as well as for the domestic ¹⁸⁴ use of the appropriator, has been repeatedly held where public rights in such waters are no more extensive or clearly defined and maintained than in this state. In *People's Ice Co. v. Davenport*, 149 Mass. 322, 14 Am. St. Rep. 425, 21 N. E. 385, the court said: "It is too well settled to be disputed that the property in the great ponds is in the commonwealth, that the public have the right to use them for fishing, fowling, boating, skating, cutting ice for use or sale, and other lawful purposes."

The supreme court of Iowa, in *Brown v. Cunningham*, 82 Iowa, 512, 516, 48 N. W. 1042, used this vigorous language in condemning the idea of government ownership, strictly so called, in public water: "The government has no more property in the water than a riparian owner or the public. The beneficent Creator opened the fountains which filled the stream for the benefit of his creatures, and has bestowed no power upon man or governments created by man to defeat his beneficence. Of course, the use of the water may be regulated by the state, but the state may not forbid its use to the people."

In the state of Maine it is held that the limit of state authority to interfere with the taking of ice from public waters is the making of regulations which will preserve the common right to do so: *Barrows v. McDermott*, 73 Me. 441; *Woodman v. Pitman*, 79 Me. 456, 1 Am. St. Rep. 342, 10 Atl. 321. In *Brastow v. Rockport Ice Co.*, 77 Me. 100, it was held that the right to take ice from a navigable lake is the common right of all, and is governed by the same rule as the public right to boat and fish. In *Woodman v. Pitman*, 79 Me. 456, 1 Am. St. Rep. 342, 10 Atl. 321, it was held that the right to take ice from navigable waters is as absolute as the right to walk upon the ice. In *Rowell v. Doyle*, 131 Mass. 474, the court said: "The right of fishing, as well as the right of taking ice in a great pond, is a public right, which every inhabitant who can obtain access to the pond without trespass may exercise, so long as he does not interfere with the reasonable exercise ¹⁸⁵ by others of these and like rights in the pond, and complies with any rules established by the legislature or under its authority."

It must be understood, in considering the above, that the reference to legislative regulations refers merely to such as the law-making power may adopt for the purpose of preserving the common rights, not to such as may be enacted to abridge or destroy those rights by treating the ice as state property instead of, if property at all in its natural state, that of the whole people. In *Wood v. Fowler*, 26 Kan. 682, 40 Am. Rep. 330, the court said, in effect, that the right to take ice, as the right to take fish in public waters, is in the whole people, and that the first taker becomes, by his act of actual appropriation, the owner. The same was held in *Concord Mfg. Co. v. Robertson*, 66 N. H. 1, 25 Atl. 118, and is laid down by text-writers as elementary: Gould on Waters, sec. 191.

From the foregoing it will be seen that wherever the title to the beds of navigable waters is in the state for public purposes,

all the incidents of public waters at common law exist, and that they include the public right of taking ice to the same extent as the right of taking fish.

Up to this point we have not referred to authority in our own state, because we have none that applies, except in principle. We have abundance of judicial authority that applies when it is understood, as the fact is, as clearly indicated by what has been said, that the right to take ice from navigable lakes is of the same nature as any of the incidental rights of the people in such waters. We have demonstrated that, as it seems, if it can be done by reference to authority. We have by no means exhausted the decisions of the courts on the subject, but it seems useless to add more, since there are no contrary decisions. We are safe in saying that no court has more definitely declared that the interest of the state in its navigable waters and the lands under them, and all the incidents thereof, are purely of a trust character, the beneficiaries, ¹⁸⁶ on a plane of perfect equality, being the whole people of the state, than this court has done in recent years. In doing that, it is believed, the people have been rescued from all dangers of losing any of those common rights by the invasion thereof by claims of private owners, if such dangers ever existed. That judicial service would be of little value if mere state ownership for the preservation of the common rights were so perverted as to support a claim of state ownership in hostility to such rights, a principle which, in the possibilities of its development, might lead to a serious impairment, if not utter ruin, of a most important trust. Such a consummation would be a very demoralizing example of how the subject of a trust may be converted to the private benefit of the trustee.

This court has repeatedly said that the navigable waters of the state have substantially the incidents of tidal waters at common law; that the title to the beds of such waters was reserved for the state by the ordinance of 1787, and vested in it at the instant it was admitted into the Union, to preserve the public character of such waters with all such incidents; and that the state never has and never can constitutionally impair the trust: *McLennan v. Prentice*, 85 Wis. 427, 444, 55 N. W. 764; *Willow River Club v. Wade*, 100 Wis. 86, 113, 76 N. W. 273; *Priewe v. Wisconsin etc. Co.*, 93 Wis. 534, 550, 67 N. W. 918; *Priewe v. Wisconsin etc. Co.*, 103 Wis. 537, 74 Am. St. Rep. 904, 79 N. W. 780; *Pewaukee v. Savoy*, 103 Wis. 271, 274, 74 Am. St. Rep. 850, 79 N. W. 436; *Mendota Club v. Anderson*, 101 Wis. 479, 78 N. W. 185; *Illinois S. Co. v. Bilot*, 109 Wis. 418, 83 Am. St.

Rep. 905, 84 N. W. 855, 85 N. W. 402; Attorney General v. Smith, 109 Wis. 532, 85 N. W. 512. In *McLennan v. Prentice*, quoting from the opinion of Mr. Justice Field in *Illinois Central Ry. Co. v. Illinois*, 146 U. S. 387, 13 Sup. Ct. Rep. 110, the court said: "The right which the state holds in these lakes is in virtue of its sovereignty and in trust for public purposes of navigation ¹⁸⁷ and fishing. The state has no proprietary interest in them, and cannot abrogate its trust in relation to them."

In *Prieve v. Wisconsin etc. Co.*, 93 Wis. 534, 67 N. W. 918, and again in the same case in 103 Wis. 537, 74 Am. St. Rep. 904, 79 N. W. 780, it was held, in effect, that the state has no such interest in the beds of navigable lakes that it can treat the same as a subject for bargain and sale, or grant the same away to private owners under the guise of police power or otherwise; that it is a mere trustee of the title thereto, under a trust created before the state was formed, to which it was appointed as trustee by its admission into the Union; that it has no active duty to perform in respect to the matter, or power over the same, except that of mere regulation to preserve the common right of all; that its power over the res is limited by the original purpose of the trust; that it is, in effect, a mere trustee of an express trust, a trustee with duties definitely defined. Those principles are too firmly established to admit, at this late day, of being seriously questioned. It seems clear that if the state cannot sell the bed of a navigable lake, it cannot sell the waters thereof, or the fish therein, or the fowls that resort to its surface, or the ice that forms thereon. The rules that limit its right as to one of those matters limit its power as to all.

The foregoing seems not only to leave no reasonable, but no possible, doubt as to the conclusion which ought to be reached in this case. It stamps the act in question, indelibly, as the result of a misconception of the state's interest in navigable lakes, and as being baseless and unconstitutional. The title to the beds of such lakes is in the state, but not for its own use as an entity. The mere naked legal title rests in the state, but the whole beneficial use thereof, including the use of the ice formed thereon, is vested in the people of the state as a class. The class opens to let out all who pass beyond, and to let in all who come within, its borders. Presence within the state is all that is necessary to participate in the ¹⁸⁸ common right. Any law to the contrary violates the fourteenth amendment to the federal constitution, guaranteeing all persons within the jurisdiction of the state the equal protection of the laws. The state can no more appropriate

to itself the ice formed upon its navigable lakes, or other navigable waters, than one person can rightly appropriate the property of his neighbor against the latter's will, and pass that title by bargain and sale, or otherwise, to the third person. Since the whole beneficial use of navigable lakes is unchangeably vested in the people, everyone within the state having the right to enjoy the same so long as he does not invade the like right of another, without any interference by claim of paramount right to the subject thereof, any law invading that individual possession is, in effect, an invasion of the right to liberty and property without due process of law, contrary to said fourteenth amendment. Any such invasion for the purpose of adding to the public revenues, exacting from a person, for the benefit of the state, compensation for the enjoyment of a right which belongs to him and which he has a right to enjoy without paying therefor, violates section 13, article 1, of the state constitution, prohibiting the taking of private property for public use without just compensation.

It is a matter of keen regret that we are compelled to place the stamp of judicial condemnation upon the work of co-ordinate branches of the government. That is true in any case, but it is especially true here, since it turns to naught a strongly fortified supposed new discovery of a rich source for adding to the revenues of the state. It is the duty of the judiciary to protect, at all points, the constitutional rights of the people from legislative interference. That duty must be performed without hesitation, with firmness and with completeness whenever the necessity therefor arises, or the blessings of constitutional liberty, as we understand the same to exist, will soon fade away. The wisdom of the fathers in securing to the whole people the right to enjoy the navigable ¹⁸⁹ waters of the state, with all their common-law incidents, beyond the possibility of any rightful prejudicial governmental interference therewith, and the consistent and vigorous defense of such right by the judiciary, will be more and more appreciated as time goes on. The right is deemed to be so strongly intrenched that all assaults upon it must fail.

By the Court. The judgment is reversed, and the cause remanded to the trial court, with directions to discharge the plaintiff in error.

The Privilege of Gathering Ice from public waters, either for sale or use, is generally considered a common right, and the ice belongs to the first appropriator: People's Ice Co. v. Davenport, 149 Mass.

322, 14 Am. St. Rep. 425, 21 N. E. 385; *Gehlen v. Knorr*, 101 Iowa, 700, 63 Am. St. Rep. 416, 70 N. W. 757. It has been held, however, that the taking of ice from a body of public water for sale in a distant market may be enjoined at the suit of a riparian proprietor, when the taking may destroy or impair the source of supply: *Sanborn v. People's Ice Co.*, 82 Minn. 43, 83 Am. St. Rep. 401, 84 N. W. 641. And the legislature may regulate the possession and cultivation of ice upon navigable streams: *Woodman v. Pitman*, 79 Me. 456, 1 Am. St. Rep. 342, 10 Atl. 321.

Public Waters.—The title to the beds of lakes, ponds, and navigable rivers, up to the line of ordinary high-water mark, became vested in the state at the instant of its admission into the Union, in trust for the benefit of its people, so as to preserve to them forever the enjoyment of the waters to the same extent that the public are entitled to enjoy tidal waters at the common law: *Illinois Steel Co. v. Bilot*, 109 Wis. 418, 83 Am. St. Rep. 905, 85 N. W. 402.

HERMAN v. SCHLESINGER.

[114 Wis. 382, 90 N. W. 460.]

ATTORNEY AND CLIENT—Confidential Communications.—

The successor of a person acting in a representative capacity, such as an assignee, cannot waive the privilege of his predecessor as to secrecy in regard to privileged communications made by the latter to his attorney while he was in office. (p. 924.)

ATTORNEY AND CLIENT—Privileged Communications.—

A client, by procuring his attorney to sign, as a subscribing witness, an instrument evidencing an agreement or transaction between such client and a third person, in the making of which and reduction whereof to writing such attorney served such client in his professional capacity, does not waive his privilege of secrecy in respect to confidential communications made during the preparation of the instrument or agreement. (p. 924.)

ATTORNEY AND CLIENT—Confidential Communications.—

If an attorney's services in a transaction are rendered to several persons, confidential communications to him in regard thereto, in which all such persons are interested, cannot be disclosed, unless all join in consenting thereto. (p. 926.)

ATTORNEY AND CLIENT—Privileged Communications.—

Third Persons.—If a person employs an attorney in his professional capacity in a transaction between such person and another, the attorney is not privileged from disclosing the communications which pass between him and the third person in regard to such employment. The privilege of secrecy, as to transactions between attorney and client, is limited to communications made by the latter to the former and to the former's advice thereon, in the course of his professional employment. (pp. 926, 927.)

ATTORNEY AND CLIENT—Confidential Communications.—

The privilege of confidential communications between attorney and client does not extend to the question whether, in the preparation of a cause for trial, the client was interrogated as to his knowledge respecting the matters involved, and the questions and answers

thereto reduced to writing, thus enabling the attorney to know what his client might be expected to testify to. (p. 929.)

EVIDENCE.—Depositions may be read in evidence only on condition that they shall have been filed with the clerk of the court, and the opposing party notified thereof before the commencement of the trial. (p. 929.)

EVIDENCE.—Error in Receiving or Rejecting Evidence in an equity case is not deemed prejudicial, in the absence of reasonable ground to believe that if the improper evidence had not been considered, and the proper rejected had been admitted and given due weight, the result might probably have been different. (p. 930.)

ACCORD AND SATISFACTION.—Consideration.—A conveyance by the debtor of his absolute title to property held by the creditor as collateral security only, and a waiver by the debtor of his right to the benefit of the bankrupt laws, is a sufficient consideration to support a settlement of the indebtedness upon payment of part of it. (p. 933.)

Action to set aside a release of indebtedness on the ground of fraud. Judgment for defendant, and plaintiff appealed.

M. M. Riley, M. Wittig, and J. B. Doe, for the appellant.

Ryan, Ogden & Bottum, for the respondent.

³⁸⁷ **MARSHALL, J.** Fifty-three assignments of error are presented for consideration. The appeal does not seem to call for a discussion of them in detail. None of them has been overlooked. Such will receive special attention in this opinion as are deemed of sufficient importance to merit it.

1. Assignments of error 1 to 6, inclusive, relate to rulings upon the trial sustaining claims of privilege made by Mr. James G. Flanders, from testifying to matters in respect to ³⁸⁸ which he was interrogated, upon the ground that whatever knowledge he had on the subjects was acquired in his professional employment by the parties to the transactions. The exceptions to such rulings present for consideration several propositions:

(a) Can the successor of a person acting in a representative capacity, such as an assignee, waive the privilege of his predecessor as to secrecy in regard to communications made by the latter to his attorney while he was in office? The attorney for an assignee, administrator, or other person similarly situated, is his private employé. At law the attorney must look to such person for his pay, and the latter must rely for reimbursement for his outlay in that regard upon the allowance of his account by the court having judicial charge of the matter. The attorney does not, as counsel for appellant seem to think, stand for the beneficiaries of the trust. He stands for the trustee. He is the latter's personal representative. The trust estate is not directly

chargeable with the attorney's claim for compensation. The professional relation existing between him and the trustee is substantially the same as it would be if the representative character of the latter were absent: *Miller v. Tracy*, 86 Wis. 330, 333, 56 N. W. 866; *Thomas v. Moore*, 52 Ohio St. 200, 39 N. E. 803; *Platt v. Platt*, 105 N. Y. 488, 501, 12 N. E. 22. Upon the trustee going out of office and being succeeded by another, there is no devolution of the liability of the former upon the latter for the expenses of the former's attorney. The outgoing trustee must account to his successor, or as the court may direct. His attorney and his successor do not, by reason of the succession, enter into the relation of attorney and client as to past transactions or any other. It follows, as a matter of course, that the new trustee has no better right than a stranger to represent his predecessor as to waiving the latter's right to ³⁸⁹ have his former professional employé remain silent as to matters communicated to him under the veil of privilege.

(b) Does a person, by procuring his attorney to sign, as a subscribing witness, an instrument evidencing an agreement or transaction between such person and a third party, in the making of which and reduction thereof to writing such attorney served such person in his professional capacity, waive the common-law privilege declared by section 4076 of the Statutes of 1898, in respect to the transaction? Counsel point with much confidence to several authorities to support the affirmative of that proposition, but we are unable to discover any good ground for such confidence. *Doheny v. Lacy*, 168 N. Y. 213, 61 N. E. 255, is one of counsel's supposed supports. There the ruling that the privilege of secrecy was waived was not put on the ground, merely, that the attorney signed the instrument as a subscribing witness, but on the ground that the communications between attorney and client were not of a confidential character, as shown by the circumstance that they were made openly in the presence of third persons. No intimation appears in the opinion of the court that a mere witnessing of an instrument, of itself, will raise the veil of secrecy between attorney and client in respect to legal advice of attorney to client or communications by the latter to the former to secure such advice. It is suggested that if an attorney acts as such in the preparation of an instrument for both parties thereto, no other person having knowledge of the transaction, each of the parties is entitled to enforce the privilege of secrecy as to disclosures for the benefit of third persons, but

not as relates to matters between themselves. Further, that the mere calling of an attorney to witness the execution of an instrument does not close his mouth as to what he sees and hears in regard to the matter to which he thereby becomes, in a sense, a party: *Coveney v. Tannahill*, 1 Hill, 33, 40, 37 Am. Dec. 287. That is upon the ground that the relation of attorney and ³⁹⁰ client is not involved in such a transaction. Counsel cite 1 Greenleaf on Evidence, section 244. That is only to the effect that if an attorney, employed to prepare an instrument, when his labor in that regard is concluded, assumes the character of a subscribing witness to the paper at the request of his client, such circumstance will waive the privilege of secrecy as to what a subscribing witness may be called to prove as such, but not as to confidential communications made during the preparation of the instrument. The text is supported by *In re Will of Coleman*, 111 N. Y. 220, 226, 19 N. E. 71, where it was held that if a testator procures the attorney who prepares his will to witness the execution thereof, he impliedly waives the privilege of secrecy between attorney and client as to those matters which such a witness is expected to testify to after the death of the testator in order that the will may be effective. But it was said that the veil of secrecy is not thereby lifted so as to permit the attorney to disclose communications made to him in the course of the preparation of the will in order to enable him to reduce the wishes of the testator to writing. That is elementary. Authority to the same effect may be found in the reported decisions of this court: *McMaster v. Scriven*, 85 Wis. 162, 168, 39 Am. St. Rep. 828, 55 N. W. 149.

The extent to which the authority goes is clearly indicated by the following language used by Mr. Justice Pinney in the last case cited, speaking of the circumstance of the attorney acting as a subscribing witness to the will prepared by him: "This must be held to be a waiver of objection to his competency, so as to leave the witness free to perform the duties of the position." The privilege of secrecy between attorney and client is grounded in the idea that communications made by the latter to the former are of a confidential nature, and must necessarily be such in order to enable the attorney to properly serve his client. The rule does not extend further than the reason thereof. Keeping that in ³⁹¹ mind it is easy to see that none of the authorities cited by counsel is in their favor under the facts of this case. The attorney whose testimony was

desired here was not merely called in to act as a subscribing witness to the instrument. The testimony had no relation to the mere execution of the paper. It did not relate to matters which occurred publicly, nor was the disclosure sought as between two persons for both of whom the attorney acted in the preparation of the paper: *Britton v. Lorenz*, 45 N. Y. 51; *Hurlburt v. Hurlburt*, 128 N. Y. 420, 26 Am. St. Rep. 482, 28 N. E. 651. Here was the ordinary case of an attorney employed as a confidential adviser in the preparation of an instrument to which he became a subscribing witness, and subsequently, in an action between other parties, he was called as a witness and requested to make disclosures in respect to the matter. He testified freely to the circumstance of his witnessing the execution of the paper, but insisted upon his client's privilege of secrecy as to matters which came to his knowledge from his client in the preparation of the paper. From what has been said it seems clear that the court properly sustained the claim of privilege.

(c) If an attorney acts in his professional capacity for two persons, does the circumstance that one of them waives the privilege of secrecy affect such privilege as to the other? It seems that Mr. Flanders performed services for the defendant and his wife. He was asked, as a witness, to disclose matters in respect thereto which came to him under the veil of secrecy as between attorney and client. The privilege was waived as to defendant, but the attorney, deeming himself in duty bound to assert that of Mrs. Schlesinger, acted accordingly, and he was sustained by the court. What has been said indicates that the ruling was right. When an attorney's services in a transaction are rendered to several persons, confidential communications to him in regard thereto, in which all such persons are interested, cannot be ³⁹² properly disclosed unless all join in consenting thereto. The rule in that regard has been carried so far as to preclude an attorney from divulging matters confidentially communicated to him by a firm without the individual consent of every member thereof: *People v. Barker*, 56 Ill. 299. The reason for that is obvious. The privilege of secrecy is purely a personal right. When it affects several persons there is no way by which all can be protected in respect thereto other than by holding that all must join in lifting the veil of silence, or it must remain a secure cover for those things which it would obscure if they related to a single person only.

(d) If a person employs an attorney to act in his profes-

sional capacity in a transaction between such person and another, is such attorney privileged from disclosing the communications which pass between him and such other in regard to such employment? Counsel for appellant do not discuss this branch of the case exactly as it appears in the record. One would suppose, from what is said in regard thereto in counsel's brief, that the attorney acted in the matter, in respect to which he was interrogated, as a mere agent. He testified to the contrary most distinctly, over and over again, saying that he was not an agent at the time of and in the transaction in question, in any sense whatever, but that he acted in the performance of his duty as a legal adviser to his clients. On that testimony, in part, the trial court acted in deciding the question of competency; so whether the ruling of the court was right is involved in a decision of the proposition we have stated. The privilege of secrecy, as to transactions between attorney and client, is limited by the statute to communications made by the latter to the former, and to the former's advice thereon, in the course of his professional employment. We are unable to see how communications between an attorney and a person not his client, while conducting a business matter with such ³⁹³ person for his client, whether he is acting professionally at the time or not, can be classed with those named in the statute. A communication made by a person to his attorney to be and in fact communicated by him to another, is not privileged, because, in the very nature of things, it is not confidential in character. The very purpose thereof is to have the communication repeated to one who is under no obligation not to divulge it: *Henderson v. Terry*, 62 Tex. 281. That being the case, manifestly a reply to such a communication must be governed by the same rule, and so must also other communications between the attorney and the third person in case of negotiations between the two.

It was claimed on the trial that the statutory privilege of secrecy includes all communications made to the attorney by reason of his professional employment, whether by his client or by third persons while he is in pursuit of his client's business, and also to all knowledge obtained by him, whether from his client or otherwise, while in pursuit of the latter's business; and the court so ruled, excluding evidence of negotiations conducted for the defendant and his wife with third persons in respect to a matter material to the issues of the case. Manifestly, the language of the statute does not justify such ruling.

Communications made to an attorney by a person while the attorney is dealing with such person as agent, merely, or agent and attorney, or attorney and counselor, of another, are in no sense communications made by the latter to such attorney, of a confidential character or otherwise. Neither the letter nor the spirit of the statute, nor any decision made under it or any similar statute or the common law, of which the statute is merely declaratory, goes to that extent, so far as we are advised. In *Koeber v. Somers*, 108 Wis. 497, 84 N. W. 991, this court, speaking by Mr. Justice Dodge, held that the privilege of secrecy as between attorney and client, recognized by the statute, extends only to those communications made by the ³⁹⁴ latter to the former which are of a confidential character and made for purpose of enabling the attorney to serve his client, and the legal advice given to the client in response to such communications; that when the attorney goes forth to perform a service for his client, with a third person, communications between such third person and the attorney are not within the privilege of secrecy. However, we are unable to perceive that the erroneous ruling of the court was prejudicial to appellant. The transactions which the attorney was requested to disclose, and substantially all the details thereof, were, either directly or by reasonable inference, established on the trial.

2. Assignments of error 13 and 14 relate to a ruling excusing respondent from answering on cross-examination as to whether, in the preparation of the case for trial, he was not examined by his attorneys, and his testimony to be given upon the stand reduced to questions and answers, upon the ground that he was privileged from answering under the rule allowing secrecy as between attorney and client. The circuit court seems to have supposed that such privilege extended to everything that occurred between respondent and his attorney respecting the subject of the business of the professional employment. That is wrong. On the other hand, counsel for appellant seem to have the idea that, while respondent was privileged to have his attorney not make disclosures respecting certain confidential communications between them, without his permission, the way was open to compel him, as a witness, to make such disclosures. That is wrong. Professional services of attorneys are essential to the orderly and efficient administration of justice, and, as a rule, to the safe conduct of legal business of any kind. Secrecy as to communications between attorney and client, to a certain extent, is required in order to

properly effectuate the purpose of the relation between the two. The foundation principle of the rule in that regard suggests, on a moment's reflection, that ³⁹⁵ what the attorney ought not to disclose without his client's permission, the latter ought not to be compelled to disclose. The law is in harmony therewith. It makes the client complete master of the situation, if his attorney properly performs his duty: *Hemenway v. Smith*, 28 Vt. 701; *Barker v. Kuhn*, 38 Iowa, 392; *Duttenhofer v. State*, 34 Ohio St. 91, 32 Am. Rep. 362; 1 Wharton on Evidence, sec. 583; *Stephen's Digest Evidence*, art. 115. However, the rule extends only to the communications mentioned in section 4076 of the Statutes of 1898, not to a mere statement as to whether, in the preparation of a cause for trial, a party was interrogated as to his knowledge respecting the matters involved, and the questions and answers thereto reduced to writing, enabling the attorney to know what his client might be expected to testify to. The evidence rejected should have been allowed. It had some bearing on the credibility of respondent's evidence. It was not admissible for any other purpose. But we are satisfied that the mere fact, if it be a fact, that respondent was carefully interrogated by his counsel before going upon the stand, the questions propounded and the witness' answers being reduced to writing, would not have affected the result of the trial, if proof thereof had been permitted. The cause turned on facts of the existence of which the court was evidently satisfied quite independently of any testimony by respondent.

3. Errors 20 to 23, inclusive, relate to refusals by the court to permit the use in evidence of a deposition taken and filed during the progress of the trial. That ruling was in strict accord with the statute, which allows the reading of a deposition in evidence only upon condition that it shall have been filed with the clerk of the court and the other party notified thereof before the commencement of the trial: *Stats. 1898*, sec. 4090.

4. A considerable number of assignments of error relate to the admission of evidence over objections by counsel for appellant, and to the rejection of evidence offered by them ³⁹⁶ upon objections made by respondent, and others to refusals by the court to compel the production of books and papers for use upon the trial, or for inspection by appellant's counsel in aid of the presentation of appellant's case or of discrediting that of respondent. Much time might be spent in dis-

cussing such assignments of error in detail, but it seems neither necessary nor advisable to do so. Errors in the reception or rejection of evidence in an equity case are not deemed prejudicial in the absence of reasonable ground to believe that if the improper evidence had not been considered, and the proper evidence rejected had been admitted and given due weight, the result might probably have been different: *Kirkland v. Telling*, 49 Wis. 634, 6 N. W. 361. Under that rule it is considered that the errors alleged, to which this paragraph is devoted, regardless of whether they are well assigned or not, were not prejudicial to the rights of appellant. If all the evidence admitted over objection had been rejected, and all the evidence offered by appellant's counsel which was rejected had been received and had shown all that counsel for appellant suggest would or might have been shown thereby, the findings of the court on matters of fact, in all reasonable probability, would not have been different than those we find in the record. Still the situation would have remained unaffected—which the trial court undoubtedly believed was the real truth of the matter—that all the property claimed by appellant to have belonged to respondent and claimed by him to have been the property of his wife, in the latter part of 1894—consisting of the capital stock of a corporation located in Mexico called the Conchenco Company—long prior to the settlement challenged and when it was perfectly proper for respondent or his wife, whoever was the owner thereof, to sell it, was conveyed, one-half to Corrigan, Ives & Co., and the other half to Henry Stern, the father of respondent's wife, in payment of indebtedness owing to them by respondent; that subsequently Stern exchanged ³⁹⁷ his stock with Corrigan, McKinney & Co., for property which he subsequently, and long before the settlement in question, gave to his daughter subject to a claim thereon for twenty-three thousand dollars, and that the same became the original assets of the Dunn Iron Mining Company, the stock of which was the property of Mrs. Schlesinger by the same right as she took title to such assets from her father; that later the Dunn Iron Mining Company, without any change in the ownership of the stock, and without the use of any capital other than that originally invested therein and the increase thereof, acquired other mining interests, the property, in the whole, constituting that regarded by appellant's counsel as the property of respondent at the time of the settlement complained of, with Plankinton, assignee. In that view, clearly, there was

no admission or rejection of evidence which, by any reasonable stretch of the imagination, can be said to have probably prejudiced appellant. If Stern acquired, legitimately, ownership of one-half of the stock of the Concheno mine—and the trial court in effect so found—it is immaterial, so far as relates to ultimate facts, whether the stock of the initial corporation formed in Milwaukee, called the Standard Metal Company, the records of which appellant's counsel sought to have produced in evidence and failed, of which complaint is made, or the stock of the Concheno mine, into which the property of the Standard Metal Company was merged, was property of respondent or that of his wife. In that view, also, it was entirely immaterial to the issues of this case what the value of the property was possessed by respondent's wife at the time of the settlement. So, failure of opportunity to make proof thereof to the satisfaction of appellant, by reason of the adverse rulings of the court of which complaint is made, was nonprejudicial.

5. The other assignments of error touching matters within the issues made by the pleadings, meriting attention, relate to whether the findings of fact are supported by the evidence. ³⁹⁸ That question turns, mainly, on whether the property derived from the transfer by Stern to his daughter, as before stated, belonged to her or to respondent at the time of the settlement in question. If it belonged to the latter, then he possessed, at the time of such settlement, a fortune out of which he might have paid a large proportion, if not all, of the indebtedness to Plankinton, assignee, and he perpetrated a fraud upon such assignee, and thereby wrongfully secured the settlement complained of. If the transfer by Stern to Mrs. Schlesinger was a legitimate transaction, then the evidence does not show that the representations, by means of which the settlement with the assignee was secured, were untrue. The trial court, as before indicated, found in favor of respondent on that subject. It would not follow that such decision is wrong if we were to determine that the stock of the Standard Metal Company, through which it is claimed respondent commenced to do business after his failure in 1893, was his property, and that the stock of the Concheno mine belonged to him when the same was turned out in payment of his indebtedness to Corrigan, Ives & Co. and to Stern. The precise manner in which the trial court reached the conclusions on matters of fact does not appear. We should hesitate on the record before us to disturb the judgment if the turning question were whether the

stock of the Standard Metal Company, and that of the Concheno mine, belonged to respondent. Viewing the decision as resting solely on whether the property given by Stern to Mrs. Schlesinger was his to bestow in that way, the creditors of respondent having at the time of such bestowal no right thereto, there is far too much evidence in the record to sustain it to warrant us in coming to the conclusion that it is against the clear preponderance of the evidence. It would take much time to go through the record in detail in an attempt to thoroughly discuss the evidence and thereby justify the trial court's findings. It is not customary to do that in a case like this, ³³⁰ where a conclusion is reached that the judgment must be affirmed. Such a discussion really serves no purpose except to satisfy counsel for the losing party that the evidence has been carefully considered in all its bearings. The preservation of such discussions in the printed records is not helpful, and it is believed that, as a rule, the better course is to omit them. Ordinarily, counsel for the losing party, who have sufficient confidence in their case to take the chances of an appeal to this court on mere questions of fact, are no better satisfied that they are wrong, and not the trial court, or, at best, satisfied that from the standpoint of the reviewing court, having only the record before it, it cannot be said that the findings of the trial court are against the clear preponderance of the evidence, after reading a laborious discussion upon appeal in justification of the conclusion there reached, than they were before. The appearance of a decision, particularly as to mere matters of fact, depends largely upon the standpoint from which the view is taken. From that of partnership occupied by the interested attorney, it looks far different than from that of a court. He who looks from the former position is bent on securing a favorable result for his client. In that situation the faculties brought into use in searching for truth for the sake of truth are not necessarily active. He who views a decision from the nonpartisan, nonprejudiced standpoint of the court is moved only by a desire to discover the right, regardless of effects and consequences which cannot be avoided and the right prevail. From the latter position we have carefully examined the evidence in this case. Counsel must take that assurance in lieu of an extended discussion of the evidence. The result of our labor is that we are unable to find justification for disturbing the findings of the court.

6. The question is presented, somewhat outside the cause of

action set forth in the complaint, of whether the settlement complained of is void for want of consideration. Counsel ⁴⁰⁰ for respondent make no objection to the proposition being considered, and we will not suggest any that might have been put forward if such exist. It is elementary that the mere acceptance, by a single creditor, of a part of an undisputed claim in settlement of the whole does not preclude a subsequent, legitimate demand for the balance thereof: *Continental Nat. Bank v. McGeoch*, 92 Wis. 286, 310, 66 N. W. 606; *Otto v. Klauber*, 23 Wis. 471; *Lathrop v. Knapp*, 27 Wis. 214, 225; *Davenport v. First Congregational Soc.*, 33 Wis. 387, 391; *Lerdall v. Charter Oak Life Ins. Co.*, 51 Wis. 426, 429, 8 N. W. 280. It is also elementary that where a creditor obtains some advantage, or promise thereof, that may possibly be realized in addition to the part payment by the debtor, for a release of the latter's indebtedness, there is a good accord and satisfaction, effectually extinguishing the same, regardless of how small the amount actually paid upon it may be: *Continental Nat. Bank v. McGeoch*, 92 Wis. 286, 310, 66 N. W. 606. Applying that to this case, the settlement in controversy cannot be impeached for want of consideration. The contract of settlement was obviously drawn with care, having in mind the legal essentials thereof in order to preclude any subsequent claim against respondent for any further sum upon the indebtedness. Absolute title to property held by the assignee as security only was conveyed to him, and the right of respondent to the benefit of the federal bankruptcy laws was waived in the former's favor. There was some advantage involved in these concessions. Absolute ownership of the collateral in place of a holding thereof as security was of itself an advantage. Admit that it was of slight, almost trifling, character, yet it must be held to have been sufficient to make a good accord and satisfaction. Independently of authority, it would seem that the giving up of the valuable right of respondent to the benefit of the federal bankruptcy laws was a substantial consideration, and sufficient to support the settlement. Counsel for respondent cite us to *Hinckley v. Arey*, ⁴⁰¹ 27 Me. 362, where it was so decided. The rigorous rule of the common law, permitting a person to receive part of an undisputed, presently due indebtedness, pretending to accept the same in satisfaction of the whole indebtedness, the debtor parting with the amount paid with that understanding, and then change front and sue for the balance of such indebtedness on the ground that the release thereof was

void for want of consideration, is so little favored by courts, that it is commonly held not to apply where anything, whether of advantage to the creditor or disadvantage to the debtor, can be reasonably said to stand for that part of the indebtedness not measured by an equivalent in money actually paid to the creditor. The common-law rule has been abolished by statute in Alabama, Georgia, Maine, North Carolina, Tennessee and Virginia, and perhaps some other states. In Connecticut it has not been recognized by the courts: *Ford v. Hubinger*, 64 Conn. 129, 29 Atl. 129. In the other states where no statute exists to the contrary, it is believed the rule is adhered to in form, but there is apparently a progressive disposition to disregard it in spirit. It is said that there is sufficient consideration moving with the part payment to release an indebtedness to take the transaction out of the common-law rule, if the debtor does anything which he is not bound by law to do, or omits to do anything which he has a right to do, to the advantage in any appreciable degree, of the creditor, or the disadvantage of himself; that the consideration, in addition to money paid, "may consist of anything which might be a burden to the one party or benefit to the other": *Watson v. Elliott*, 57 N. H. 511; *Jaffray v. Davis*, 124 N. Y. 164, 26 N. E. 351; *Maddux v. Bevan*, 39 Md. 485.

Nothing further, it seems, need be said in disposing of this case.

By the Court. The judgment appealed from is affirmed.

Privileged Communications between attorney and client are considered at length in the monographic note to *O'Brien v. Spalding*, 66 Am. St. Rep. 213-243. See, also, *National Bank v. Delano*, 177 Mass. 362, 83 Am. St. Rep. 281, 58 N. E. 1079; *Miller v. Palmer*, 25 Ind. App. 357, 81 Am St. Rep. 107, 58 N. E. 213.

STATE v. KREUTZBERG.

[114 Wis. 530, 90 N. W. 1098.]

CONSTITUTIONAL LAW—Labor Unions—Right to Discharge Employee.—A statute prohibiting, under a penalty, an employer from discharging "an employé because he is a member of any labor organization," is void, as an unwarranted and unlawful infringement of the constitutional right of "liberty" in making private contracts. (pp. 946, 947.)

Discharge upon habeas corpus from an arrest and imprisonment for having discharged an employé because he was a member of a labor organization. The statute under which the arrest was made is sufficiently stated in the opinion. The state appealed.

W. H. Bennett, district attorney, F. E. McGovern, assistant district attorney, and C. E. Buell, first assistant attorney general, for the plaintiff in error.

Nath, Pereles & Sons and G. D. Goff, for the defendant in error.

⁵³¹ DODGE, J. In this case we are confronted with that gravest of sociological questions: How far, consistently with freedom, may the rights and liberties of the individual member of society be subordinated to the will of the government? That question has been at war from the very first existence of any form of government. For many centuries, while debated as an ethical and philosophical question, it was resolved ⁵³² in each instance by force or by the ability to exert force. A little more than a century ago the attempt was made by the American people to define the limits by written contract, and to withdraw their decision and vindication from the arena of physical strife and transfer it to the peaceful forum of the judiciary. In line with that attempt, the people of what is now the commonwealth of Wisconsin, some sixty years ago, formulated their constitution. Their purpose, unquestionably, was to create a government endowed with the essential attributes of sovereignty. The very preamble declares that it is adopted in order to secure the blessings of liberty and form a more perfect government. In the organization of that government it was provided that the legislative power shall be vested in a senate and assembly: Const., art. 4, sec. 1. By a long line of decisions and consensus therein by the people of the various states, it has become settled that thereby all powers of a legislative character ordinarily enjoyed by sovereign governments became vested in the state legislature, except so far as restrained expressly or by substantially necessary implication elsewhere in the constitution: Cooley's Constitutional Limitations, 201, 206; 1 Tiedeman on Control of Persons and Property, 9. The very first section of that constitution, however, declares the purpose of the government about to be created by it in these words: "All men are born equally free and independent, and have certain inherent rights

among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."

At this late day it cannot be doubted that this declaration of the purpose to be accomplished is to be construed as a limitation upon the powers given. By the preamble, preservation of liberty is given precedence over the establishment of government. It would be inconceivable that the people of Wisconsin, in establishing a government to secure the rights ⁵³³ of life, liberty, and the pursuit of happiness, should by general grant of legislative power have intended to confer upon that government authority to wholly subvert those primary rights; and in this view it has been held by this court that legislative acts conflicting with that declared purpose are forbidden by the constitution, and must be denied efficacy by the courts: *Durkee v. Janesville*, 28 Wis. 464, 471, 9 Am. Rep. 500; *State v. Currens*, 111 Wis. 431, 435, 87 N. W. 561. We say by the courts, for elsewhere in the constitution the judicial power is vested in them; and that the judicial power, and therefore the judicial duty, includes repudiation of an attempted act of legislation prohibited by the constitution, was declared by the supreme court of the United States, at the pen of Chief Justice Marshall, in *Marbury v. Madison*, 1 Cranch, 137, and had, before the adoption of our constitution, become settled by a long line of authority: 1 *Kent's Commentaries*, 449; *Cooley's Constitutional Limitations*, c. 7; *Baily v. Gentry*, 1 Mo. 116; *Bloodgood v. Mohawk etc. R. R. Co.*, 18 Wend. 9, 31 Am. Dec. 313; *Dartmouth College Case*, 4 Wheat. 518, 625.

A question which immediately arises in the consideration of any act of the legislature restraining individuals is the exact meaning of the words "life, liberty and the pursuit of happiness," which are to be secured by the government, and must not be destroyed by it. That these words are not to be taken in their absolute sense is, of course, obvious. Individuals may, notwithstanding this prohibition, be deprived of life or liberty as punishment for crime, and they may be deprived of some measure of property or of happiness in deference to, and protection of, the welfare of the whole community. Indeed, most of the legislative acts which fill our statute books detract in some measure from the absolute freedom of the individual to act wholly at the dictate of his will, and yet are of either decided or fully recognized constitutionality. On the other hand, these words in the constitution are not to receive an unduly limited construc-

tion. It has become settled, ⁵³⁴ for example, that "liberty" does not mean merely immunity from imprisonment, and that "property" is not confined to tangible objects which can be passed from hand to hand; that within the former word is included the opportunity to do those things which are ordinarily done by free men, and the right of each individual to regulate his own affairs, so far as consistent with rights of others; and within the latter, those rights of possession, disposal, management, and of contracting with reference thereto, which render property useful, valuable, and a source of happiness, right to pursuit of which is preserved: 2 Story on Constitution, 5th ed., sec. 1950; Cooley on Torts, 278; 2 Tiedeman Control of Persons and Property 939; Butchers' Union etc. Co. v. Crescent City etc. Co., 111 U. S. 746, 757, 4 Sup. Ct. Rep. 652; Allgeyer v. Louisiana, 165 U. S. 578, 589, 17 Sup. Ct. Rep. 427; Niagara Fire Ins. Co. v. Cornell, 110 Fed. 816, 822; State v. Julow, 129 Mo. 163, 50 Am. St. Rep. 443, 31 S. W. 781; Ritchie v. People, 155 Ill. 98, 46 Am. St. Rep. 315, 40 N. E. 454; Gillespie v. People, 188 Ill. 176, 80 Am. St. Rep. 176, 58 N. E. 1007; Commonwealth v. Perry, 155 Mass. 117, 31 Am. St. Rep. 533, 28 N. E. 1126; In re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; People v. Coler, 166 N. Y. 1, 82 Am. St. Rep. 605, 59 N. E. 716; Janesville v. Carpenter, 77 Wis. 288, 301, 46 N. W. 128.

In Allgeyer v. Louisiana, 165 U. S. 578, 589, 17 Sup. Ct. Rep. 427, the court said by Mr. Justice Peckham: "The liberty mentioned in that [fourteenth] amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."

In Carew v. Rutherford, 106 Mass. 1, 14, 8 Am. Rep. 287, it is pointed out that the very existence of the ordinary labor union rests upon ⁵³⁵ the inherent liberty of individuals to contract or refuse to do so, otherwise such organizations would be criminal at common law. In that case, too, are collected actual instances of governmental restriction of liberty deemed legitimate before our constitutions, but now clearly prohibited thereby. Some of these are acts making it criminal to take excessive

wages; requiring handicraftsmen, meet to labor, to work by the day for their neighbors in certain work; fixing the price of labor; and the like.

In *Allen v. Flood*, [1898] App. Cas. 1, the complaint was that certain union iron-workers confederated and threatened to quit unless certain nonmembers were discharged. In the course of the opinion of Herschell, J., it was said: "A man's right not to work or not to pursue a particular trade or calling, or to determine when or where or with whom he will work, is in law a right of precisely the same nature, and entitled to just the same protection, as a man's right to trade or work"; and in the same case, by Lord Watson: "It is, in my opinion, the absolute right of every workman to exercise his own option with regard to the persons in whose society he will agree or continue to work."

In *Doremus v. Hennessy*, 176 Ill. 608, 68 Am. St. Rep. 203, 52 N. E. 924, where the employer refused to abide by the prices prescribed by a laundry union, and the members of the union refused to work for her, the court sustained them in so doing, and said: "Every man has a right, under the law, as between himself and others, to full freedom in disposing of his own labor or capital according to his own will."

In the somewhat famous case of *Arthur v. Oakes*, 11 C. C. A. 209, 63 Fed. 310, wherein the circuit court, during the labor troubles of 1894, enjoined certain employes from "so quitting . . . as to cripple the property or prevent or hinder the operation of said railroad," the court of appeals, speaking by Harlan, J., held that was erroneous, as invading the natural rights of men. He said: "It would be an invasion ⁵³⁶ of one's natural liberty to compel him to work for, or to remain in the personal service of, another. . . . The rule, we think, is without exception that equity will not compel the actual, affirmative performance by an employe of merely personal services, any more than it will compel an employer to retain in his personal service one who, no matter for what cause, is not acceptable to him for service of that character." It was there further held that it was error to enjoin the employes from "striking," for the reason that included in the meaning of the word "strike" was the mere concurrence of a number of individuals, in the exercise of their inherent right, to quit their employment, which no court ought to interfere with unless they were bound by contract.

Judge Cooley (Cooley on Torts, 278) says: "It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal

rests upon reason, or is the result of whim, caprice, prejudice, or malice."

Mr. Tiedeman (2 Control of Persons and Property, sec. 204) says: "Every man has a natural right to hire his services to anyone he pleases, or refrain from such hiring; and so, likewise, it is the right of everyone to determine whose services he will hire. . . . Governments, therefore, cannot exert any restraint upon the actions of the parties."

But however well established that the words "liberty" and "pursuit of happiness" include the right of private contract, so that a deprivation of the latter is a deprivation of each of the former, yet the far more difficult question remains whether any given statute constitutes a forbidden deprivation. As we have already said, the constitutional restriction in this respect is not absolute. The very existence of government renders imperative a power to restrain the individual to some extent. This is called the "police power," of which definition has been attempted by jurists and text-writers with so little success as to well-nigh discourage further attempts. It may ⁵³⁷ be described, though not defined, as the power of the government to regulate conduct and property of some for safety and property of all. But in what degree? In a despotism, absolutely in the discretion of the despot. In a less than despotism, not absolutely, but with some limitations. To ascertain and declare those limitations scientifically is, and for long to come will be, the despair and struggle of courts. The present period witnesses unexampled popular consideration, and, apparently, belief in the widest scope of governmental activity and interference with the individual. That tendency has affected, and of course will further affect, the legislative representatives of the people, who will undoubtedly deem it their duty to attempt to give it effect in the laws they make. With this tendency as a policy of government, courts have nothing to do. If the popular belief in a despotic or a socialistic form of government such as demands complete surrender of individual liberty, is strong enough and general enough to lead the people to delegate it to the legislature, authority to enforce such surrender will exist, and courts must give full effect to the laws enacted under it. That authority has not yet been given, however; and until the people, in the prescribed manner, shall amend the constitution, the theory of government now written therein must control, and courts must enforce its limitations against legislative attempts to exceed them. While the judiciary is not the guardian of civil rights or liberty in the abstract, it is

the guardian of so much thereof as by constitutional restrictions the government is forbidden to disturb.

By the constitution is granted the police power—the power to restrain the individual of some measure of his liberty of action and of his property; but this goes no further than to authorize the enactment of laws necessary to reasonable protection of the safety and welfare of the general community, and not depriving the individual of liberty in the constitutional sense. By the same instrument, liberty is guaranteed ⁵³⁸ to the individual; but that means only civil liberty—that measure of freedom which may be enjoyed in a civilized community consistently with peaceful enjoyment of like freedom in others. Absolute freedom in one is necessarily subversive of liberty for those with whom he comes in contact, unless such others be strong enough to resist and curtail his will. The liberty of one man begins where another's terminates. Such definitions as the foregoing, however, do not greatly advance us toward any a priori location of a line of demarcation. They amount to little more than a declaration that police power extends to such measure of restraint as is consistent with liberty; and liberty, that measure of freedom consistent with the police power. This impossibility of exact demarcation characterizes all discussion of the subject, yet the careful expressions of these alternative conceptions of properly limited government, on the one hand, and due freedom from restraint, on the other, are useful when we approach a concrete case. Therefore, quotations of some such expressions may be helpful.

The conception of civil liberty has been variously phrased thus: "Every man may claim the fullest liberty to exercise his faculties, compatible with the possession of like liberty by every other": Spencer's *Social Statics*, 94. "That man is free [under the law] who is protected from injury": 2 Webster's Works (Boston, 1854), 393. "Liberty consists in doing what we ought to will, and in not being constrained to do what we ought not to will": Montesquieu. "Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same rights by others": Field, J., in *Crowley v. Christensen*, 137 U. S. 86, 89, 11 Sup. Ct. Rep. 13. "That government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body, without any restraint": Story, J., in *Wilkinson v. Leland*, 2 Pet. 627.

⁵³⁹ The conception of the function of government to restrain liberty under the police power has called forth the following attempts at expression and definition: "The police power of the state . . . is coextensive with self-protection, and is not inaptly termed the 'law of overruling necessity.' It may be said to be that inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort, safety, and welfare of society": *Lake View v. Rose Hill C. Co.*, 70 Ill. 191, 22 Am. Rep. 71. It is said to be limited only by the legislative discretion, "provided its acts do not go beyond the great principle of securing the public safety": *State v. Noyes*, 47 Me. 189. "If . . . a statute purporting to have been enacted to protect the public health [etc.] has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge": *Harlan, J., in Mugler v. Kansas*, 123 U. S. 623, 661, 8 Sup. Ct. Rep. 273. It is said that laws conflicting with express constitutional prohibitions "can be only such as are so clearly necessary to the safety, comfort, or well-being of society, or so imperatively required by the public necessity, as to lead to the rational and satisfactory conclusion that the framers of the constitution could not . . . have intended to prohibit their exercise in the particular case": *Christiancy, J., in People v. Jackson etc. Plank Road Co.*, 9 Mich. 285. "It must appear, first, that the interests of the public generally, as distinguished from a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive on individuals": *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. Rep. 499. "The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations": *Id.* "Cannot change innocence into guilt, or punish innocence as a crime": *Chase, J., in Calder v. Bull*, 3 Dall. 386. "Any law which goes beyond ⁵⁴⁰ that principle ["*Sic utere tuo ut alienum non lædas*"]—which undertakes to abolish rights, the exercise of which does not involve an infringement of the rights of others, or to limit the exercise of rights beyond what is necessary to provide for the public welfare and the general security—cannot be included in the police power of the government": *Tiedeman Control of Persons and Property* 5. "The general right of every person to pursue any calling, and to do so in his own way, provided that he does not encroach upon the rights of others, cannot

be taken away from him by legislative enactment": *Ruhrstrat v. People*, 185 Ill. 133, 76 Am. St. Rep. 30, 57 N. E. 41. "Of course, for reasons of public policy, matters of immorality and crime cannot be the subject of contract. But it is not for the legislature alone to declare public policy. If this were so, then any contract can be denounced as against public policy, and the evils our fathers sought to be rid of are with us again": *Niagara Fire Ins. Co. v. Cornell (C. C.)*, 110 Fed. 816, 822. "The police power of the state extends to all regulations affecting the lives, limbs, health, comfort, good order, morals, peace, and safety of society": *Cassoday, J., in State v. Heinemann*, 80 Wis. 253, 256, 27 Am. St. Rep. 34, 49 N. W. 818.

Free will in making private contracts, and even in greater degree in refusing to make them, is one of the most important and sacred of the individual rights intended to be protected. That the present act curtails it directly, seriously, and prejudicially, cannot be doubted. The success in life of the employer depends on the efficiency, fidelity, and loyalty of his employes. Without enlarging upon or debating the relative advantages or disadvantages of the labor union, either to its members or to the community at large, it is axiomatic that an employer cannot have undivided fidelity, loyalty, and devotion to his interests from an employé who has given to an association right to control his conduct. He may by its decisions be required to limit the amount of his daily product. He may be restrained from teaching his art to others. He ⁵⁴¹ may be forbidden to work in association with other men whose service the employer desires. He may not be at liberty to work with such machines or upon such materials or products as the employer deems essential to his success. In all these respects he may be disabled from the full degree of usefulness attributable to the same abilities in another who had not yielded up to an association any right to restrain his freedom of will and exertion in his employer's behalf according to the latter's wishes. Such considerations an employer has a right to deem valid reasons for preferring not to jeopardize his success by employing members of organizations. A man who has by agreement or otherwise shackled any of his faculties—even his freedom of will—may well be considered less useful or less desirable by some employers than if free and untrammelled. Whether the workman can find in his membership in such organizations advantages and compensations to offset his lessened desirability in the industrial market is a question each must decide for himself. His right to freedom in so doing

is of the same grade and sacredness as that of the employer to consent or refuse to employ him according to the decision he makes. We must not forget that our government is founded on the idea of equality of all individuals before the law. Such restraints as may be placed on one may be placed on another. If the liberty of the employer to contract or refuse to contract may be denied, so may that of the employé. In answering the question now before us, we may not forget the possibility of being called on to answer whether the legislature may make a criminal of the employé who quits, for example, because his employer joins a blacklisting association; because nonunion men or members of some other union are employed, or nonunion or forbidden machines or materials are used; because of an obnoxious foreman; because excessive hours of work are required; because compelled to trade at employer's store or board at his boarding-house; or because of any other fact or conduct now considered entirely ⁵⁴² adequate reason for refusing or leaving a particular service. It must not be forgotten, if, as counsel for the state argues, the laborer is too weak to meet the employer on equal terms in the field of contract, that he will be far more subject to the latter's control and oppression in the field of politics, and that laws of the above character will surely come, if within the proper province of the legislature, unless, as we have faith to believe, the character and the individuality of the wage-earners of the country are sufficient to maintain their independence—both contractual and political—in a field of equal rights under the law, and of full liberty to each to sell and buy labor to and from whom he will.

As already mentioned, recent times have witnessed much increase in legislative activity in the way of interference with individual conduct, and especially with transactions between employer and employé. The views of the courts as to the constitutionality of many such laws are in serious conflict, as illustrated by the following decisions. Statute and common-law prohibition against conspiracies have generally been held invalid so far as they merely prohibit the employé from quitting individually or in concert with others: *Arthur v. Oakes*, 11 C. C. A. 209, 63 Fed. 310. 1 *Tiedeman Control of Persons and Property*, 424, where it is said: "No law could deny him this right, without violating the constitutional principle of liberty of contract, unless he has been engaged to serve for a definite period of time." An act forbidding deductions from wages because of defective work is held invalid, so far as it interferes with the making of contracts for em-

ployment, in *Commonwealth v. Perry*, 155 Mass. 117, 31 Am. St. Rep. 533, 28 N. E. 1126. Acts regulating the time of payment of wages in defiance of contract are held valid in *Skinner v. Garrett Gold Min. Co.*, 96 Fed. 735, and in *Opinion of Justices*, 163 Mass. 589, 40 N. E. 713, but invalid in *Leep v. St. Louis etc. Ry. Co.*, 58 Ark. 407, 427, 41 Am. St. Rep. 109, 25 S. W. 75, and *Braceville Coal Co. v. People*, 147 Ill. 66, 37 Am. St. Rep. 206, 35 N. E. 62. Acts in mining regions requiring that payment shall be based upon coal without screening, so far as they prohibit contracts to the contrary, are held invalid in *Ramsey v. People*, 142 Ill. 380, 32 N. E. 364, and in *re Preston*, 63 Ohio St. 428, 81 Am. St. Rep. 642, 59 N. E. 101; valid in *State v. Wilson*, 7 Kan. App. 428, 53 Pac. 371. Acts prohibiting payment in orders are held unconstitutional, as invading the liberty of contract, in *State v. Haun*, 61 Kan. 146, 59 Pac. 340; *Frorer v. People*, 141 Ill. 171, 31 N. E. 395; *State v. Loomis*, 115 Mo. 307, 22 S. W. 350; *Godcharles v. Wigeman*, 113 Pa. St. 431, 6 Atl. 354; and valid in *Dayton C. & I. Co. v. Barton*, 103 Tenn. 604, 53 S. W. 970; *Harbison v. Knoxville I. Co.*, 103 Tenn. 421, 76 Am. St. Rep. 682, 53 S. W. 955; *Knoxville I. Co. v. Harbison*, 183 U. S. 13, 22 Sup. Ct. Rep. 1; also in *Hancock v. Yaden*, 121 Ind. 366, 16 Am. St. Rep. 396, 23 N. E. 253; but in the last case on the ground that the state has the right to prohibit the use of anything except legal tender to circulate as money. Statutes limiting hours of labor have been held invalid, as infringing the right of contract, in *Low v. Rees P. Co.*, 41 Neb. 127, 43 Am. St. Rep. 670, 59 N. W. 362, and *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315, 40 N. E. 454, on the ground that his labor is the property of the workingman, and government has no power to restrict him in selling it as he deems most to his advantage. Such legislation is held valid in *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. Rep. 383, with reference to labor in mines, on the ground that long hours are prejudicial to health, and therefore within proper regulation, under the police power, to preserve the general health. An act prohibiting farriers from shoeing horses without first obtaining a license is held unconstitutional in *Illinois: Bossette v. People*, 193 Ill. 334, 62 N. E. 215, 219.

The nearest parallel we have found to the act in question are laws enacted in Missouri and Illinois, nearly identical with our law as it existed before the amendment of 1899—namely, making criminal attempts to coerce employes against membership in labor unions, by discharge or otherwise. In *State v. Julow*, 129 Mo. 163, 50 Am. St. Rep. 443, 31 S. W. 781, such

law was held ⁵⁴⁴ unconstitutional as unduly invading the liberty of the employer to make or refuse to make contracts with whom he pleased. In that case the act committed was merely discharging an employé, and it was contended that it was prohibited by the law. The court said: "If an owner [etc.] obeys the law on which this prosecution rests, he is thereby deprived of a right and a liberty to contract or terminate a contract as all others may. . . . We deny the power of the legislature to do this; to brand as an offense that which the constitution designates and declares to be a right, and therefore an innocent act." And further: "Nor can the statute escape censure by assuming the label of a police regulation. It has none of the elements or attributes which pertain to such a regulation, for it does not, in terms or by implication, promote, or tend to promote, the public health, welfare, comfort, or safety; and, if it did, the state would not be allowed, under the guise and pretense of police regulation, to encroach or trample upon any of the just rights of the citizen, which the constitution intended to secure against diminution or abridgment." In *Gillespie v. People*, 188 Ill. 176, 80 Am. St. Rep. 176, 58 N. E. 1007, was considered a similar act, claimed to be breached by discharging an employé because he was a member of a certain labor organization. That court also held the act unconstitutional, adopting substantially the views of the Missouri court in the preceding case. The court said: "One citizen cannot be compelled to give employment to another citizen, nor can anyone be compelled to be employed against his will. The act . . . now under consideration deprives the employer of the right to terminate his contract with his employé. The right to terminate such a contract is guaranteed by the organic law of the state. The legislature is forbidden to deprive the employer or employé of the exercise of that right. The legislature has no authority to pronounce the performance of an innocent act criminal, when the public health, safety, comfort, or welfare is not interfered with." "Liberty ⁵⁴⁵ includes not only the right to labor, but to refuse to labor, and consequently the right to contract to labor or for labor, and to terminate such contracts, and to refuse to make such contracts."

On this subject Mr. Tiedeman (Control of Persons and Property 332) declares the opinion that a state statute which made it unlawful for an employer to refuse to employ union men, or to compel an employé to withdraw from a trade union on pain of dismissal, would be clearly unconstitutional. In *Georgia*

a statute requiring an employer to give to a discharged workman a certificate stating the reasons of the discharge is held unconstitutional on the ground that the right of discharge may be exercised without any reason or explanation: *Wallace v. Georgia etc. Ry. Co.*, 94 Ga. 732, 22 S. E. 579. In *Missouri* the same principle on which an act prohibiting discharge of men by reason of membership in unions was held unconstitutional in the *Julow* case, *supra*, is held to preclude interference with members of a union in soliciting others to refuse to trade with a manufacturer: *Marx etc. Co. v. Watson*, 166 Mo. 133, 67 S. W. 391. In *New York*, union men are held not liable for compelling discharge of nonunionists by threats to strike: *National Pro. Assn. v. Cumming*, 170 N. Y. 315, 63 N. E. 369. Many other illustrations might be given, but the foregoing suffice to show the confusion among different courts, and probably the general tendency on such subjects.

In considering our own statute under which relator is committed, it must first be noted that we are concerned only with that portion added to pre-existing statutes (Stats. 1898, sec. 4466b) by the act of 1899: "No person or corporation shall discharge an employé because he is a member of any labor organization," for the relator is not charged with breach of any other of the provisions of that act. Confining ourselves, then, to the act so charged and the statutory prohibition involved ⁵⁴⁶ is it within the legislative power to make criminal the refusal to contract with another for his labor for any reason which the employer deems cogent? We speak of refusal to contract, for, while the act mentions only discharge, it is in no wise limited to situations where there is any contract or other right to continuance of employment, and is obviously intended by the framers to apply generally to the relation of employer and employé, where, as common knowledge assures us, there is usually no term of employment and each day constitutes a new contract. As each morning comes, the employé is free to decide not to work, the employer to decide not to receive him, but for this statute. That the act in question invades the liberty of the employer in an extreme degree, and in a respect entitled to be held sacred, except for the most cogent and urgent countervailing considerations, we have pointed out. Hardly any of the personal civil rights is higher than that of free will in forming and continuing the relation of master and servant. If that may be denied by law, the result is legalized thralldom, not liberty—certainly not to the laboring men of the country.

This aspect of the subject is too clear to warrant further discussion. Is there any conceivable reason to warrant such extreme invasion of individual liberty? Can it be necessary to the reasonable liberty of others under the law? The act here charged as criminal clearly does not deprive any other person of any private or civil right. Its utmost effect is to deny privilege of contract, but no right exists to enter into contract with another against his will. The maxim, "*Sic utere tuo ut alienum non lædas*," cannot justify restraint of acts which do not injure others in their legal rights. We therefore find entirely lacking one of the requisites of the police power to restrain conduct, declared by many authorities to be an essential—namely, that such conduct shall injuriously affect the rights of others: 1 Tiedeman Control of Persons and Property 5; *Ruhstrat v. People*, 185 Ill. 133, 76 Am. St. Rep. 30, 57 N. E. 41; *Niagara Fire Ins. Co. v. Cornell* (C. C.), 110 Fed. 816.

547 But though not directly injurious to the rights of other individuals, is the forbidden act injurious to the welfare of the community? Is its prohibition so essential to the existence of good government that we must assume the constitution builders intended the liberty which they reserved should be subject to it? Or does it so tend to promotion of public peace or safety that we can reasonably attribute to the legislation such a purpose? After most careful consideration, we find ourselves unable to reach an affirmative answer to any of these queries. We have sought to give to the legislature the benefit of every doubt. We have examined the decided cases in great number; we invited counsel for the state to suggest, and we have given loose to our own invention and imagination; but we are unable to discover reason to think that the legislation is needful for or even calculated to protect public welfare, though cogent reasons to the contrary readily present themselves. Those courts which have sustained the various laws above mentioned, interfering in some degree with freedom of contract, when they have discussed the subject, have found some respect in which the public were interested, or thought to be. Thus, in forbidding the screening of coal before weighing, the legislature was held to be exercising merely the recognized governmental function of regulating weights and measures: *State v. Wilson*, 7 Kan. App. 428, 53 Pac. 371; *Yates v. Milwaukee*, 12 Wis. 673. Limiting hours of labor in mines or of children in factories has been justified by the peril to general health: *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. Rep. 383. Prohibition of payment in

orders has been sustained upon the governmental power to regulate current money: *Hancock v. Yaden*, 121 Ind. 366, 16 Am. St. Rep. 396, 23 N. E. 253. In Wisconsin, laws have been treated as or declared valid, though restricting freedom in conducting business, when was apparent a purpose of promoting or protecting public health in (slaughter-houses) *Taylor v. State*, 35 Wis. 298; (pharmacists) *State v. Heinemann*, 80 Wis. 253, 27 Am. St. Rep. 34, 49 N. W. 818; ⁵⁴⁸ (plumbers) *State v. Benzenberg*, 101 Wis. 172, 76 N. W. 345; (physicians) *State v. Currens*, 111 Wis. 431, 87 N. W. 561. Obviously, however, none of these considerations can be involved in the policy underlying the legislation now under consideration.

One menace to public welfare was suggested by counsel for plaintiff in error, based upon the assertion that discharges of employes, especially union men, are likely to be followed by turbulence, violence, and even bloodshed; hence that it was proper to deprive employers of their rights, presumably because they are ordinarily law-abiding and will not make trouble. We decline to acknowledge as a fact that the laboring men, as a class, union or nonunion, are more prone to law-breaking or violence than other classes of the community, or to adopt the theory that the legislature so assumed. But even if that assumption were made, it would constitute no justification for depriving one man of his liberty of contract that another was likely to commit crimes or breaches of the peace. As well deny the right of private ownership of chattels because they tempt the thief to steal. Neither the restriction imposed nor the penalty is at all relevant to the public purpose sought, nor to the wrongful acts threatened. Nevertheless, the suggested purpose seems to have had weight with the supreme court of Tennessee in *Harbison v. Knoxville I. Co.*, 103 Tenn. 443, 76 Am. St. Rep. 682, 53 S. W. 960, as justifying an act compelling mining employers to pay in money orders for coal issued to their workmen. Whether the characteristics of wage-earners in Tennessee or the conception of liberty are such as to warrant the decision must be left to the courts there. We cannot so view them in Wisconsin. It is the reservation of liberty and pursuit of happiness made by our own constitution, thus limiting the police power conferred upon our legislature, by which we must be controlled. Thereunder we hold that freedom to make, and, even more, to refuse to make, contracts, whereby no rights of others suffer, cannot be restricted, ⁵⁴⁹ unless otherwise will result substantial disturbance of the public

health, safety, or welfare, and that even a possible tendency of some persons to wrongfully disturb the peace when thwarted of their will constitutes no justification for restraining others of their just rights; nor, if so, is the present act at all calculated or reasonably necessary to prevent the only suggested menace to the community.

As the legislation clearly and beyond doubt invades the natural liberty of the individual, it must be void, unless we can discover both the existence of a public need, and at least tendency of the statute to provide therefor. In the search for such need and purpose we must and do concede to the legislative branch of the government the fullest exercise of discretion within the realm of reason, and, if a public purpose can be conceived which might rationally be deemed to justify the act, the court cannot further weigh the adequacy of the need or the wisdom of the method. When, however, after all diligence and reflection, we are unable to discover any such public need or purpose, we have no alternative conclusion, save that the legislature has, "under the guise of protecting public interests, arbitrarily interfered with private business and imposed unusual and unnecessary restrictions upon lawful occupations," which it may not do: *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. Rep. 499. It has, then, taken from one his liberty and property, not for a public purpose, but for the benefit of other individuals, which is but robbery under the forms of law: *Citizens' etc. Assn. v. Topeka*, 20 Wall. 655, 664.

The act of 1899 is further assailed upon the charge that it is class legislation, not affecting alike all persons similarly situated and conditioned, and therefore prohibited by the requirement of article 1, section 1 of our constitution—that equal freedom be preserved to all men—discussed in *State v. Currens*, 111 Wis. 431, 87 N. W. 561, and *Black v. State*, 113 Wis. 205, 89 N. W. 522. This objection was sustained in *State v. Julow*, 129 Mo. 163, 50 Am. St. Rep. 443, 31 S. W. 781, and ⁵⁵⁰ *Gillespie v. People*, 188 Ill. 176, 80 Am. St. Rep. 176, 58 N. E. 1007; but, as we have reached the conclusion that the legislation is not within the police power of this state at all, we need not consider whether the attempted exercise of that power is defective.

We agree with the trial court that the enactment under consideration exceeded the limitations imposed by the constitution of Wisconsin upon the legislature. It is therefore void, and conferred no power upon the magistrate to make the commit-

ment under which petitioner was held in custody. His discharge therefrom was not error.

By the Court. The order of the superior court of Milwaukee county is affirmed.

Constitutional Law.—A statute making it criminal for any employer to attempt to prevent his employé from joining labor unions, or to discharge him because of his connection with a labor union, was declared unconstitutional in *Gillespie v. People*, 188 Ill. 176, 80 Am. St. Rep. 176, 58 N. E. 1007. And in *State v. Julow*, 129 Mo. 163, 50 Am. St. Rep. 443, 31 S. W. 781, a statute making it a crime for an employer to impose as a condition of employment that his employé shall withdraw from or refrain from joining any trade or labor union, was held unconstitutional: See, in this connection, *People v. Coler*, 166 N. Y. 1, 82 Am. St. Rep. 605, 59 N. E. 716. In *State v. Justus*, 85 Minn. 279, 89 Am. St. Rep. 550, 88 N. W. 759, a statute prohibiting the blacklisting of discharged employes was upheld. An employer is not under any obligation to give his discharged employé a clearance paper: *New York etc. R. R. Co. v. Schaffer*, 65 Ohio St. 414, 87 Am. St. Rep. 628, 62 N. E. 1034.

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2. RAILROADS—Passenger on Platform—Negligence.—If a railroad company receives compensation for carrying passengers upon the platforms of its cars because of the overcrowded condition of the latter, it cannot avoid responsibility for an injury to a passenger occupying such platform to which he does not contribute; but if the passenger, while riding on the car platform, extends his body, or some part thereof, beyond the side of the car from curiosity or other unjustifiable cause, his act is negligent, and he cannot recover for an injury resulting therefrom. (Minn.) *Benedict v. Minneapolis etc. R. R. Co.*, 345.

3. NEGLIGENCE—Youth of Immature Years.—A boy sixteen years of age, traveling alone, is not, because of his youth, incapable in law of exercising sufficient judgment and discretion to avoid incurring the risk of a voluntary exposure of part of his body beyond the sides of a moving railroad train, or to avoid the consequences of any act of culpable negligence. (Minn.) *Benedict v. Minneapolis etc. R. R. Co.*, 345.

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5. RAILROADS—Rights Under Passenger Ticket.—In the absence of agreement, rule or regulation, the obligation created by the sale of a regular, full rate, noncoupon railroad ticket is for one continuous passage, and if the passenger voluntarily leaves the train at an intermediate station, while the carrier is engaged in the performance of the contract, he thereby releases it from further performance, and has no right to demand such performance on another train or at another time. (Tenn.) *Railroad v. Klyman*, 755.

6. RAILROADS—Wrong Reason for Rejection of Passenger Ticket.—If a railroad passenger ticket is invalid for any reason, the fact that the train conductor assigns a wrong reason for its rejection does not prevent the setting up of the invalidity of the ticket as a defense to an action to recover for a refusal to honor it. (Tenn.) *Railroad v. Klyman*, 755.

7. RAILWAYS—Duty of to Provide Fire in Waiting-room.—If one goes to a railway depot to take passage on a train, and at a time when the weather is such as to require a fire in the waiting-room to make it comfortable, it is the duty of the railway company to build and keep a fire therein, and if it fails to do so, and the intending passenger suffers injury in consequence, he is entitled to recover therefor. (Ark.) *St. Louis etc. Ry. Co. v. Wilson*, 74.

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15. **RAILROADS—Contract to Furnish Cars—Discrimination.**—If a railroad company contracts to furnish a shipper with cars at a certain time, its action in filling subsequent orders for cars before such shipper is supplied is an unlawful discrimination for which it must respond in damages. (Utah) *Nichols v. Oregon Short Line etc. Co.*, 778.

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17. RAILROADS—Agent's Contract to Furnish Cars—Burden of Proof as to Authority.—A contract by a railway station agent on behalf of his company to furnish a shipper cars belonging to another company is presumptively within the scope of his authority, and the burden of proof is upon the railway company to rebut such presumption and show his want of authority. (*Utah*) *Nichols v. Oregon Short Line etc. Co.*, 778.

18. RAILROADS—Agent's Contract to Furnish Cars.—A contract by a railroad station agent on behalf of his company to furnish a shipper certain cars belonging to another company is within the apparent scope of his authority and binding on his principal. (*Utah*) *Nichols v. Oregon Short Line etc. Co.*, 778.

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2. CHATTEL MORTGAGES.—Parol Evidence is Admissible for the purpose of identifying the property actually mortgaged, as where it serves to supply the description of the subject matter intended to be embraced by it, and not to change the description. (*Iowa*) *Frick v. Fritz*, 165.

3. CHATTEL MORTGAGE Defective in Description—Notice of to Attaching Creditors.—Though the description in a mortgage of chattels intended to be embraced therein is too imperfect to impart notice to an attaching creditor, yet if he or his attorney is advised by the mortgagor that all of his cattle were mortgaged to *Morris & Co.*, and an examination is thereupon made of the records, and the mortgage in question discovered, such creditor must be regarded as having actual notice of the mortgage and that the property imperfectly described in subject thereto. (*Iowa*) *Frick v. Fritz*, 165.

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2. CONSTITUTIONAL LAW—Interstate Commerce.—A statute does not violate the interstate commerce clause of the national constitution, because it provides that a bill of lading shall be conclusive proof against the corporation issuing it of the amount of the property received by such corporation. (Kan.) *Missouri etc. Ry. Co. v. Simonson*, 248.

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2. REPLEVIN—Confusion of Goods.—When does not Prevent Recovery in.—If a defendant owning staves of the same kind, quality, and value as the plaintiff, intermingles them without the fault of

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1. **CONSTITUTIONAL LAW.**—The Legislature, just as completely as a constitutional convention, represents the will of the people in all matters left open by the constitution. (S. Dak.) *Chamberlain v. Wood*, 674.

2. **CONSTITUTIONAL LAW.**—Presumptively a Statute is Valid, unless clearly in conflict with the constitution. (S. Dak.) *Chamberlain v. Wood*, 674.

3. **CONSTITUTIONAL LAW**—Statutory Construction.—An exposition of the meaning of a statute in the statute itself cannot be departed from by the courts, and if the legislative intent in the statute is plain, such intent must be deemed the sole purpose of the act, however unreasonable or absurd the statute may be. (Wis.) *Rossmiller v. State*, 910.

4. **CONSTITUTIONAL LAW** — Failure to Release Mortgage.—A statutory provision that if a mortgagee fails to release a mortgage after the satisfaction thereof, the mortgagor may, by action, compel such release and recover costs, including a reasonable attorney's fee from such mortgagee, is special legislation, and violates a constitutional provision that no special law shall be enacted when a general law can be made applicable. (Utah) *Openshaw v. Halfin*, 796.

5. **CONSTITUTIONAL LAW** — Supreme Court — Legislative Power to Annul Rule of Respecting the Mode of Printing Transcripts on Appeal.—A rule of the supreme court requiring transcripts on appeal to be printed cannot be abrogated by the act of the legislature permitting them to be typewritten, though the constitution declares that the appellate jurisdiction of the supreme court shall extend to all cases at law or in equity, subject, however, to such limitations and restrictions as may be prescribed by law. (Mont.) *Jordan v. Andrus*, 396.

6. **CONSTITUTIONAL LAW** — Conclusive Evidence.—A statute declaring that in any action brought against a railway corporation for a failure to deliver grain, either duplicate of the bill of lading should be conclusive proof of the amount of grain received by such corporation, is unconstitutional. (Kan.) *Missouri etc. Ry. Co. v. Simonson*, 248.

7. **SPECIAL LEGISLATION.**—A Statute Providing for Primary Elections in cities of ten thousand or more population, "as shown by the last state or federal census," though applicable to only one city when enacted, extends to all that subsequently may reach such population, and is not special or local. (Or.) *Ladd v. Holmes*, 457.

8. **CONSTITUTIONAL LAW** — Labor Unions — Right to Discharge Employé.—A statute prohibiting, under a penalty, an employer from discharging "an employé because he is a member of any labor organization," is void, as an unwarranted and unlawful infringement of the constitutional right of "liberty" in making private contracts. (Wis.) *State v. Kreutzberg*, 934.

9. **CONSTITUTIONAL LAW** — Rights in Public Waters.—The right of every person within the state to enjoy its public waters for every legitimate purpose, including the cutting and appropriation of ice, which does not wrongfully interfere with the right of any other person to like enjoyment, subject only to such mere police

regulations as the legislature may, in its wisdom, prescribe to preserve the common heritage of all, is a constitutional right of all persons within the state. (Wis.) *Rossmiller v. State*, 910.

10. **CONSTITUTIONAL LAW**.—Ice Formed Naturally upon the public waters of the state is not state property, in a proprietary sense, so as to enable the state, under authority of a statute, to deal with it by sale made by the state, or otherwise. (Wis.) *Rossmiller v. State*, 910.

11. **CONSTITUTIONAL LAW**.—Rights in Ice.—The state can no more appropriate to itself the ice formed upon its navigable waters than one person can rightfully appropriate the property of another without his consent and pass the title by bargain and sale or otherwise. The whole beneficial use in such ice is vested in all of the people within the state as a class, and any law invading such use is an invasion of the right to liberty and property, without due process of law. (Wis.) *Rossmiller v. State*, 910.

Constitutional Law, elections, statutes restricting the right of the voter to persons whose names appear on the official ballot,

See Carriers, 13; Commerce; Criminal Law, 4; Elections; Eminent Domain; Statutes.

CONTRACTS.

1. **CONTRACTS**.—Construction.—If the language used by parties to a contract is indefinite and ambiguous, and hence of doubtful construction, the practical construction of the parties themselves is entitled to great, if not controlling, influence. (Utah) *Jenkins v. Jensen*, 783.

2. **CONTRACTS**.—Presumption that Signer Read.—Affixing a signature to a contract creates a conclusive presumption, except as against fraud, that the signer read, understood and assented to its terms. (N. J. L.) *Fivey v. Pennsylvania R. R. Co.*, 445.

3. **CONFLICT OF LAWS**.—A Contract for the Payment of money entered into bona fide in one place and made payable in another, is construed, governed, and enforced according to the law of the place where payable. (Or.) *Pacific States Savings etc. Co. v. Hill*, 477.

See Infants; States.

CONVERSION.

See Trover and Conversion.

CONVEYANCES.

See Deeds; Vendor and Vendee.

CORPORATIONS.

1. **CORPORATIONS**.—Right to Recover Assets of Extinct Corporation.—Personal representatives of the deceased stockholders of an extinct corporation are entitled to recover the proceeds of a life insurance policy held by the corporation as collateral security, to the extent of the debt, for pro rata distribution according to the interests of their several intestates after the payment of the debts of the corporation. (Tenn.) *Insurance Co. v. Dunscomb*, 769.

2. CORPORATION—Distribution of Assets—Parties.—A bill for the distribution of the assets of a corporation among the stockholders, which avers that the respondents are the principal shareholders and represent the adverse interest of all, that all the shareholders belong to the same class and have analogous interests, and that it would be impossible to bring the cause to a final hearing if all the stockholders are required to be made parties, is not demurrable because all the stockholders are not made parties. (Ala.) *Noble v. Gadsden Land etc. Co.*, 27.

3. CORPORATION—Distribution of Assets.—Minority Stockholders of a solvent corporation may maintain a bill for the distribution of its assets, when the enterprise for which it was organized has been abandoned and the original scheme is impossible of consummation. (Ala.) *Noble v. Gadsden Land etc. Co.*, 27.

4. MINING COMPANIES—Authority of General Manager to Employ Physicians for Injured Employees.—If employes of a mining corporation are injured by an accident for which it is not liable, its general manager has no implied authority on its behalf to employ physicians or surgeons to attend them, or to bind it by a promise to pay for such services. (Mont.) *Spelman v. Gold Coin Min. etc. Co.*, 402.

5. MINING CORPORATIONS—General Manager—Powers of.—Unless the limits of his authority are shown to have been enlarged, the duties of the general manager of a mining corporation are confined to the transaction of the business of the corporation as distinguished from its mere ethical duties and consequent imperfect obligations or supposed charities. The fact that a certain person is manager of such a corporation does not in itself impose authority on him to bind it in matters other than those of business affairs. (Mont.) *Spelman v. Gold Coin Min. etc. Co.*, 402.

6. FOREIGN CORPORATIONS—Maintenance of Action by.—If a statute requires foreign corporations to do certain acts, and if they refuse, they shall not maintain any suit or action in any of the courts of the state, the doing of those acts, though not within the time prescribed by the statute, authorizes the corporation to proceed with the prosecution of an action previously pending. (Ark.) *Buffalo Zinc etc. Co. v. Crump*, 87.

7. FOREIGN CORPORATIONS—Doing Business by—What is.—The institution and prosecution of an action are not a doing of business within the state within the meaning of the statute relating to foreign corporations. (Ark.) *Buffalo Zinc etc. Co. v. Crump*, 87.

8. FOREIGN CORPORATION—Agent to Receive Service.—A loan association is not within the purview of a statute requiring foreign banking concerns to appoint a resident of the state as attorney on whom writs and process may be served. (Or.) *Pacific States Sav. etc. Co. v. Hill*, 477.

Corporations, dissolution of, because object of becomes impossible, right of equity to compel, 34.
dissolution of, equity has no jurisdiction over, 33.
dissolution of, stockholders' right to insist upon, 34.
equity, power to dissolve and distribute assets, 33-35.
interpleader, bills by to determine to whom dividends should be paid, 611.

See Receivers.

CORPUS DELICTI.

See Criminal Law, 3; Larceny, 2.

COTENANCY.

See Mines.

COUNTIES.

COUNTY ROAD—Injury from Construction of. — If, in the construction of a county road, the water of a lake is drained onto lower lands, the county is liable for the injury occasioned, irrespective of negligence. (Wash.) *Wendel v. Spokane County*, 825.

County Clerks, sureties of, liability of for acts as license collectors, 569.

sureties of, liability of for acts as recorders, 569.

sureties of liability of for acts in ex-officio capacities, 569.

sureties of, liability of for issuing warrants without authority, 569.

sureties of, liability of for misappropriation of funds, 568.

sureties of, liability of for when acting in special capacities, 571, 571.

COURTS.

1. **COURT DE FACTO**—When Cannot Exist.—Though an election is authorized to be held to determine whether a court shall exist, and after such election returns are canvassed, the proper officers certify that the proposition has carried, and a judge and other necessary officers are appointed and assume to exercise the duties of their offices, yet if it is afterward established that the result of such election was not in favor of creating such court, it cannot be treated as a court de facto. (Kan.) *In re Norton*, 255.

2. **COURTS AND OFFICERS De Facto**.—There cannot be a court or officer de facto where there can be no court or officer de jure. (Kan.) *In re Norton*, 255.

3. **JURISDICTION**.—A Court is not of Competent Jurisdiction unless it is provided for in the constitution or created by the legislature, and has jurisdiction of the subject matter and of the person. (Kan.) *In re Norton*, 255.

COVENANTS.

1. **HEIRS**—Liability of for the Debts of an Ancestor.—By the common law an heir or devisee was not liable for the breach of a covenant unless expressly bound, but this rule did not apply to covenants which ran with the land, among which are covenants to warrant and defend the title. (Iowa) *McClure v. Dee*, 181.

2. **HEIRS**—Liability of on Covenants of an Ancestor, When Accrues.—To authorize a recovery against an heir or devisee, it must appear that the ancestor's estate was settled and closed before the claim accrued to the covenantee. (Iowa) *McClure v. Dee*, 181.

3. **HEIRS**—Claims Against, Whether Barred by the Statute of Limitations.—Though a covenant against encumbrances is broken as soon as made, and there may be a recovery of nominal damages thereunder, yet there can be no recovery of substantial damages until the encumbrance is enforced, and therefore, the cause of action, as to such damages, cannot be regarded as accruing or becoming sub-

ject to the statute of limitations until that time. (Iowa) McClure v. Dee, 181.

4. **PARTIES TO ACTION to Enforce Ancestor's Liability.**—If the grantor in a conveyance with covenants of warranty or against encumbrances subsequently dies, bequeathing his property to his wife for life, with power to use both principal and interest to supply herself with the comforts and luxuries she may desire, with remainder to a trustee for several beneficiaries, an action for damages resulting from the breach of the testator's covenant is properly brought against the wife and trustee, instead of against the remaindermen under the will. Perhaps they also should be made parties, but as this question is not covered by the demurrer, it is not decided. (Iowa) McClure v. Dee, 181.

See Vendor and Vendee.

CREDITORS.

See Debtor and Creditor.

CREDITORS' SUIT

CREDITORS' BILL—Reducing Claims to a Judgment, When not Necessary.—It is not necessary, to support a suit by an administrator to set aside a conveyance by a decedent as in fraud of the latter's creditor, to show that they have reduced their claims to judgment. (Iowa) Mallow v. Walker, 158.

CRIMINAL LAW.

1. **FORMER JEOPARDY.**—An Acquittal of an Assault with a deadly weapon, with an intent to rob, is not a bar to a prosecution for robbery, the two offenses being a part of one transaction.' (S. Dak.) State v. Caddy, 666.

2. **CRIMINAL LAW**—Reasonable Doubt.—A Charge to the jury that "unless the evidence is such as to exclude to a moral certainty every hypothesis but that of the guilt of the defendant of the offense charged in the indictment, you should acquit him," is correctly refused.' (Ala.) Smith v. State, 21.

3. **CRIMINAL LAW.**—The Corpus Delicti must often be proved by circumstances. (Ala.) Smith v. State, 21.

4. **CONSTITUTIONAL LAW**—Criminal Trials—Admissibility of Former Testimony of Witness Since Deceased or Absent.—A statute providing that if the testimony of a witness is taken down by question and answer on a preliminary examination before a committing magistrate, in the presence of the defendant, who has, either in person or by counsel, cross-examined, or has had an opportunity to cross-examine, the witness, such testimony, or the deposition of such witness, may be read upon the trial upon it being satisfactorily shown to the court that he is dead or insane, or cannot, with due diligence, be found within the state, is not in conflict with a constitutional guaranty, that the accused shall have the right "to be confronted by witness against him." (Utah) State v. King, 808.

5. **CRIMINAL LAW**—Admissibility of Testimony of Witness Since Dead or Absent.—If it is shown that the accused has cross-examined a witness, or has had an opportunity of so doing upon the preliminary examination, the testimony of such witness may be read at the trial, upon its being shown to the satisfaction of the court,

that such witness is dead, insane, or cannot with due diligence be found within the state. The admission of the testimony under such circumstances is not a matter of right but rests in the sound discretion of the trial court. (Utah) *State v. King*, 808.

6. **PRACTISE**—Mode of Objecting to the Line of Argument of Counsel.—If, on the trial of a person accused of a crime, the prosecuting attorney relies upon a fact from which the defendant's attorney claims that no inference can be drawn against him, the proper practise is for him to ask the court to rule that such fact is not evidence, and cannot be used against the accused for any purpose on the trial, and if such ruling be refused, to except. (Mass.) *Commonwealth v. Goldstein*, 311.

7. **CRIMINAL TRIALS**.—The fact that the accused, though not represented by an attorney, offered no testimony at the preliminary examination, is admissible at his trial, especially where his defense is an alibi. What conclusion shall be drawn from such evidence is for the jury to determine. (Mass.) *Commonwealth v. Goldstein*, 311.

8. **CRIMINAL LAW**.—A court has no power to suspend sentence after it is pronounced, save for the purposes of an appeal. (Iowa) *Miller v. Evans*, 143.

9. **CRIMINAL LAW**.—Failure of Officers to Enforce a Sentence of Imprisonment, due either to delay in issuing the execution or in taking defendant into custody after it issues does not prevent his subsequent arrest and imprisonment. The time when a sentence is to be carried out is ordinarily directory merely, and forms no part of the judgment of the court. (Iowa) *Miller v. Evans*, 143.

DAMAGES.

1. **DAMAGES for Nervous Shock**.—If the plaintiff in consequence of a collision, received certain physical injuries on account of which the defendant is liable, and also a nervous shock, she is entitled to recover for the consequences of the shock, whether it was due to, or merely accompanied, the visible injury. (Mass.) *Homans v. Boston Elevated Ry. Co.*, 324.

2. **DAMAGES**.—There Can be no Recovery for Mental Anguish Unaccompanied by Personal Injury, where there is no willful, wanton, or malicious wrong done. (Ark.) *St. Louis etc. Ry. Co. v. Wilson*, 74.

3. **DAMAGES, Measure of**—Interest.—In awarding damages for an injury, the jury should take into account the lapse of time since it was suffered, and put plaintiff in as good position as if the damages had been paid immediately. Therefore, they may fix such damages by ascertaining what was the amount which should have been paid at the time the injury occurred and by adding thereto such sum as will compensate delays in its payment, not exceeding the legal rate of interest. (Mass.) *Ainsworth v. Lakin*, 314.

See Carriers, 11; Conflict of Laws; Death; Municipal Corporations, 3; Telegraphs and Telephones.

DANGEROUS PREMISES.

See Negligence.

DEATH.

1. **DAMAGES for Loss of Advice, Counsel, Comfort and Enjoyment** resulting from a husband's death, caused by the negligent act

of another, cannot be recovered by his widow. (Tenn.) *Railroad v. Bentz*, 763.

2. **EVIDENCE** that a Person Killed upon a Railroad was a Careful Man About His Work is not admissible in an action to recover damages for such killing as bearing on the measure of damages. In determining the value of a human life, consideration may be given to the habits of the decedent as to sobriety and industry, because such qualities affect his capacity to earn money. (Ind. App.) *Pittsburgh etc. Ry. Co. v. Parish*, 120.

3. **CHILD NOT YET BORN**—Action for Injuries to.—For injuries received by a child while in its mother's womb it cannot maintain a civil action. Therefore, under a statute declaring that whenever the death of a person is caused by the neglect or default of another, and the neglect or default is such that if death had not ensued it would have entitled the party injured to maintain an action to recover damages, then the wrongdoer shall be liable to action notwithstanding such death, the proceeds of the action to go to certain kindred specified in the statute, an action cannot be maintained by the next of kin of an infant for negligently causing its death while in its mother's womb. (R. I.) *Gorman v. Budlong*, 629.

Death, conflict of laws as to measure of damages in actions for tortiously causing, 726, 727.

DEBTOR AND CREDITOR.

A **CREDITOR IS ONE** who has a right to demand and recover of another a sum of money on any account whatever. (Ind. App.) *De Ruiter v. De Ruiter*, 107.

See Accord and Satisfaction.

DEEDS.

1. **UNDUE INFLUENCE**.—The Burden of Proving undue influence, for the purpose of having a will or deed set aside, is upon the party seeking that relief. (Iowa) *Mallow v. Walker*, 158.

2. **UNDUE INFLUENCE**, to Justify the Setting Aside of a Deed, must have been such as to overcome the will of the grantor, and to destroy, to some extent, at least, his free agency. It must further appear that the undue influence was exercised at the time the act referred to was done. (Iowa) *Mallow v. Walker*, 158.

3. **UNDUE INFLUENCE**.—An act is not due to undue influence though it resulted by reason of the influence of affection or a mere desire to gratify the wishes of another, if the free agency of the party is not impaired. (Iowa) *Mallow v. Walker*, 158.

4. **UNDUE INFLUENCE** is not Proved by showing that a disposition made by a parent of his property among his children is unreasonable or unjust. (Iowa) *Mallow v. Walker*, 158.

5. **UNDUE INFLUENCE**.—Parol Declarations of Intention contrary to a subsequent disposition of property do not alone prove undue influence. (Iowa) *Mallow v. Walker*, 158.

6. **UNDUE INFLUENCE** is not Presumed from the fact that the provision made is by a parent in favor of his child. (Iowa) *Mallow v. Walker*, 158.

7. **UNDUE INFLUENCE**.—Though it Appears that a Deed or Will was Executed at the Suggestion or Request of the Grantee or

devisee, and was prompted by the influence which he acquired by business confidence or the showing of an affectionate regard, this does not prove undue influence, unless freedom of will has been in some way impaired or destroyed. (*Iowa*) *Mallow v. Walker*, 158.

See Covenants; Vendor and Vendee.

DEFAULT JUDGMENT.

See Judgments, 5.

DEPOSITIONS.

EVIDENCE.—Depositions may be read in evidence only on condition that they shall have been filed with the clerk of the court, and the opposing party notified thereof before the commencement of the trial. (*Wis.*) *Herman v. Schlesinger*, 922.

DEPOTS.

See Carriers.

DIVORCE.

1. **DIVORCE.**—Alimony to an Innocent and Injured Wife Should be in a Proportion to leave her at least as well off pecuniarily on noncohabitation as she would be if cohabiting. An appellate court will not interfere with the decree of a trial court in allowing alimony unless an abuse of discretion is manifest. (*Ind. App.*) *De Ruiter v. De Ruiter*, 107.

2. **DIVORCE.**—Support of Children.—A Divorced Wife, having the custody of the children, may sue her former husband for expenses incurred in their support and also for their future support. (*Wash.*) *Ditmar v. Ditmar*, 817.

3. **DIVORCE.**—Attorneys' Fees.—The Fact that a Wife has Property of Her Own does not prove that an allowance of attorneys' fees to her in a decree divorcing her from her husband is improper or unreasonable. (*Ind. App.*) *De Ruiter v. De Ruiter*, 107.

4. **DIVORCE.**—Attorneys' Fees.—Under a statute making it the duty of the trial court in decreeing divorce to a wife to require the husband to pay her reasonable expenses in the prosecution of her suit, an allowance may be made in her favor for attorneys' fees. (*Ind. App.*) *De Ruiter v. De Ruiter*, 107.

5. **ATTORNEYS' FEES.**—In an Action by a Divorced Wife against her former husband for the support of their children, she cannot recover attorneys' fees. (*Wash.*) *Ditmar v. Ditmar*, 817.

DRAFT.

See Sales, 3.

DRUGGISTS.

1. **SALE OF DANGEROUS ARTICLES.**—When Justifiable.—When a person of the age of discretion, and apparently in the possession of his mental faculties applies to a druggist for a designated drug, he, by implication, represents to the seller that he knows its properties and uses, and that he is a fit person to whom the sale thereof may be made, and, unless there is something connected with the transaction, or previously known to the seller, indicating that the would-be pur-

chaser cannot safely be intrusted with the substance, a sale thereof to him may be made without explaining its properties and the manner in which it may be safely used or handled. (Iowa) *Gibson v. Torbert*, 147.

2. **NEGLIGENCE in the Sale of Phosphorus**—What is not.—If a druggist receives a written order for phosphorus and sends it to the writer properly packed in water and labeled, such druggist is not guilty of negligence because he did not explain the properties of the phosphorus, nor the dangers of improperly using it, and he is not liable for injury sustained by the purchaser from the explosion of the phosphorus when taken from the water and dropped on the floor. It is not a new or dangerous substance with the qualities of which the general public is not acquainted. (Iowa) *Gibson v. Torbert*, 147.

3. **NEGLIGENCE — Selling Dangerous Article to an Illiterate Person**.—The fact that the letter by which the writer ordered phosphorus to be sent to him by express by a druggist was badly spelled and poorly written is not equivalent to a notice that the writer is unacquainted with the properties of the article ordered, so as to render the druggist liable for injuries resulting to such writer from his ignorance of such properties, and his consequently taking the phosphorus out of the water in which it was sent and dropping a stick of it on the floor, from which an explosion resulted. (Iowa) *Gibson v. Torbert*, 147.

EASEMENTS.

THE EASEMENT of Light and Air is placed along with the easement of access, the one no more important than the other, except in degree. (Ala.) *First Nat. Bank v. Tyson*, 46.

See Licenses; Municipal Corporations, 9.

EJECTMENT.

1. **IN EJECTMENT for Land Occupied by Defendant**, his plea of not guilty admits a possession or claim of title, not in subordination to plaintiff. (N. J. L.) *French v. Robb*, 433.

2. **EJECTMENT — Complaint, Sufficiency of.** — A complaint in ejectment alleging that plaintiff is the owner and entitled to the possession of the land described therein, and that it is wrongfully withheld, is sufficient, without alleging in detail the particular facts upon which his claim of title is based. (Minn.) *Atwater v. Spalding*, 331.

3. **EJECTMENT — Public Streets.** — The owner of the soil in a public street has such a right of possession as is capable of supporting the action of ejectment. (N. J. L.) *French v. Robb*, 433.

4. **EJECTMENT—Public Streets.**—The owner of the soil in a public street cannot maintain ejectment against a public corporation occupying the street within the limits of the public right. (N. J. L.) *French v. Robb*, 433.

Ejectment, by one cotenant of a mine against another, 834.

See Municipal Corporations, 5; Pleading, 4.

ELECTIONS.

1. **ELECTIONS.**—The Words "Free" and "Equal" in a constitutional provision that all elections shall be free and equal, signify that elections shall not only be open and untrammelled to all endowed

with the elective franchise, but shall be closed to all not in the enjoyment of such privilege. (Or.) Ladd v. Holmes, 457.

2. **PRIMARY ELECTIONS.**—A Statute Requiring primary elections for the selection of delegates to nominating conventions provides for elections "authorized by law and not elsewhere provided for by the constitution," within section 2, article 2 of the Oregon constitution, prescribing the qualifications of electors. (Or.) Ladd v. Holmes, 457.

3. **A PRIMARY ELECTION LAW Limiting the Electors' Privilege** at the respective primaries to party members is constitutional. (Or.) Ladd v. Holmes, 457.

4. **A PRIMARY ELECTION LAW Denying Its Privileges** to parties casting less than three per cent of the vote at the preceding election, but providing a mode of obtaining representation on the official ballot for such parties is constitutional. (Or.) Ladd v. Holmes, 457.

5. **PRIMARY ELECTION.**—Every Elector Should be as Free to express his choice of a candidate for office as to denote his choice of an office at the polls. (Or.) Ladd v. Holmes, 457.

6. **PRIMARY ELECTIONS.**—Party Management and Affairs, so far as they concern the naming of candidates for public office, are proper objects of legislative supervision. (Or.) Ladd v. Holmes, 457.

7. **PRIMARY ELECTION LAW**—Invasion of Party Affairs.—A primary election law providing for the appointment of judges and clerks of the election by the county court, prescribing a test for party affiliation, and directing the manner of the election of committeemen, fixing their terms of office, and specifying their duties, is not an unwarranted interference with party management. (Or.) Ladd v. Holmes, 457.

8. **PRIMARY ELECTIONS**—Nonregistered Voter.—The Oregon primary election law providing that no one may vote unless "he shall have complied with the requirements of the law relating to registration of electors, and shall be entitled to vote at the ensuing general election," does not close the doors to all electors who had not secured registration prior to primary day. They may vote under certain conditions. (Or.) Ladd v. Holmes, 457.

9. **PRIMARY ELECTIONS**—Special Election.—It is no valid objection to a primary election law that it makes no provision for special elections. (Or.) Ladd v. Holmes, 457.

10. **PRIMARY ELECTION LAW.**—The Country Precincts are not discriminated against under sections 24 and 25 of the Oregon primary election law. (Or.) Ladd v. Holmes, 457.

11. **PRIMARY ELECTIONS**—Expenses.—The Legislature may impose the expense of primary elections in a city upon the whole county wherein it is located. (Or.) Ladd v. Holmes, 457.

12. **CONSTITUTIONAL LAW.**—The Right of Suffrage is not a natural or civil right, but a privilege conferred upon the person by the constitution and the laws of the state. (S. Dak.) Chamberlain v. Wood, 674.

13. **CONSTITUTIONAL LAW**—Restricting Right to Vote.—The legislature may, by requiring the names of all candidates for office to be printed upon the official ballot, deny the right of voters to write on their ballots the names of candidates not printed there. (S. Dak.) Chamberlain v. Wood, 674.

14. ELECTIONS.—If on ballots on which the same name appears two or more times as that of a candidate for the same office, a stamp is placed opposite such name in two of the places in which it so appears, such double markings do not constitute distinguishing marks nor a marking of more names than there are persons to be elected to the office, but only a marking of the same name more times than is necessary, and the ballots should be counted. (Kan.) *Parker v. Hughes*, 216.

15. ELECTIONS—Ballots.—A distinguishing mark, to warrant the rejection of a ballot, must be found to have been made for the purpose of identification. (Kan.) *Parker v. Hughes*, 216.

16. ELECTIONS.—If a Package of Returns from an Election Precinct Contains More Ballots than were Counted Therein, and it is not possible to distinguish those which were not counted from those that were, the whole package is not to be rejected, but the surplus ballots should be deducted from the count of both parties in proportion to the vote for each in the precinct, but if, on inspection, it is found that so many of the ballots must be rejected that the number remaining is less than the number voted in the precinct, the balance of the ballots should be counted for the candidates for whom they were respectively voted. (Kan.) *Parker v. Hughes*, 216.

17. ELECTIONS—Distinguishing Marks.—Ballots marked with ink or with a pencil other than black, or with a single stroke instead of a cross, or with a cross after a name, and also with a cross in the square after the blank space on the right of the ballot without any name being written there, must all be rejected as bearing distinguishing marks. The same result must follow where the ballot has lines drawn across it or names partially or wholly obliterated by pencil marks, or names or initials written thereon. (Kan.) *Parker v. Hughes*, 216.

18. ELECTIONS—Ballots, When Must be Rejected.—If a Statute Makes it Criminal to so mark a ballot that it can be distinguished, such statute necessarily implies that such ballot cannot be counted. (Kan.) *Parker v. Hughes*, 216.

Elections, ballots, official, power of the legislature to prescribe, 685.

ballots, official, voters cannot be restricted to candidates whose names are printed upon, 688.

ballots, official, whether must allow the elector to vote for the candidate of his choice, 686, 687.

ballots, printing of, power of legislature to require and regulate, 685.

constitutionality of statutes restricting voters to persons whose names are printed on the ticket, 683.

suffrage, restrictions which the legislature may impose on the exercise of the right of, 685.

suffrage, whether a natural or a political right, 685.

ELECTRIC COMPANIES.

See *Municipal Corporations*, 5, 6.

EMINENT DOMAIN.

1. EMINENT DOMAIN—Constitutionality of Statute Allowing Damages.—It is within the power of the legislature to authorize the allowance of damages in proceedings in the exercise of the power of eminent domain, though such damages are of a character for

which it need not have authorized such allowance. The legislature is not forbidden to be just in some cases where it is not required to be by the letter of paramount law. (Mass.) *Earle v. Commonwealth*, 326.

2. **EMINENT DOMAIN**—Constitutionality of Statutes Allowing Compensation for Loss of Business.—A statute authorizing, in proceedings in the exercise of the power of eminent domain, an allowance to persons who have the possession of lands in a specified town, whether such lands were taken or not, for decrease in the value of business, is not unconstitutional. (Mass.) *Earle v. Commonwealth*, 326.

3. **EMINENT DOMAIN**—Owner of Established Business on Land, Who is.—Under a statute providing that anyone owning an established business in a designated town, whether on lands taken or not, shall be allowed damages for a decrease in the value of his business, whether by loss of custom or otherwise, a physician who has his office in a house belonging to his wife, which is taken under the act, is entitled to be allowed for any loss accruing to him by the consequent changing of his place of business. (Mass.) *Earle v. Commonwealth*, 326.

4. **EMINENT DOMAIN**—Market Value—When not the Measure of Damages.—Under a statute allowing compensation for decrease in value of business due to carrying out a statute, the amount recoverable is not measured by the difference in the market value of the business before and after the taking, but by the difference in value between the business carried on before the proceeding was taken under the statute and a similar business carried on by the same person in the nearest available place. (Mass.) *Earle v. Commonwealth*, 326.

Equity, corporations, power of, to dissolve and to distribute assets, 83-85.

EVIDENCE.

1. **EVIDENCE**.—All Facts are Admissible in evidence which afford reasonable inferences, or throw any light upon the matter contested. (Wash.) *Callihan v. Washington etc. Power Co.*, 829.

2. **EVIDENCE**.—The Trip Report of a Street-car Conductor, showing the number of passengers on a certain trip and that they paid cash fares, is admissible in evidence against one who claims to have been a passenger, under a transfer slip, on that trip and negligently injured. (Wash.) *Callihan v. Washington etc. Power Co.*, 829.

3. **EVIDENCE**.—Error in Receiving or Rejecting Evidence in an equity case is not deemed prejudicial, in the absence of reasonable ground to believe that if the improper evidence had not been considered, and the proper rejected had been admitted and given due weight, the result might probably have been different. (Wis.) *Herman v. Schlesinger*, 922.

4. **EVIDENCE**—*Res Gestae*.—Whenever Evidence of an act is in itself admissible as a material fact, and is so admitted, the declarations accompanying and characterizing the act are a part of the *res gestae*, and are admissible in explanation of act. (Ala.) *Campbell v. State*, 17.

5. **EVIDENCE**—*Res Gestae*.—In a Prosecution for Murder, if evidence is introduced that the defendant went to the place where the deceased and another were engaged in a quarrel, and, participating therein, killed the deceased, declarations made by the defendant on starting for the scene of the altercation are admissible as part of the *res gestae*. (Ala.) *Campbell v. State*, 17.

6. EVIDENCE—Foreign Language—Testimony of What Interpreter Said at the Former Trial.—On the trial of an indictment for perjury claimed to have been committed by testimony given at a prior trial in a foreign language, and then interpreted to the court and jury, it is error to permit a witness to testify to the translation of the testimony as made at such former trial by the interpreter. What he there said must be regarded as hearsay only. The only exception to this rule arises where the interpreter acted as agent of the witness in translating his testimony. (R. I.) *State v. Terline*, 650.

7. EVIDENCE Taken at a Former Trial may be Proved on a Second Trial of the Same Action if the witness has removed from the state or is otherwise beyond the jurisdiction of the court. (Kan.) *Atchison etc. R. R. Co. v. Osborn*, 189.

8. EVIDENCE.—A Stenographer Who Took the Testimony at a Former Trial of the Cause, and who is able to read his notes and willing to testify that they are correct, should be permitted to testify therefrom as to what was the testimony of a witness at such former trial. (Kan.) *Atchison etc. R. R. Co. v. Osborn*, 189.

9. EVIDENCE.—It is Presumed that the Common Law is the same in the several states of the Union. (Minn.) *Engstrand v. Kleffman*, 359.

10. EVIDENCE—Duty of Court to Limit Effect of.—The admission of a conveyance of lands adjoining those upon which the defendant had cut timber can be justified only for the purpose of showing an honest misapprehension of the boundary, and the jury should be so informed, and instructed that it is not evidence of title to lands claimed by the plaintiff, but not described therein. (Ark.) *Eust Land etc. Co. v. Isom*, 68.

See Constitutional Law, 6; Criminal Law, 4, 5; Depositions; Witnesses.

Evidence, right of is sufficient to render testimony admissible in the second trial, 201.

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EXECUTIONS.

EXECUTION—Property Subject to.—Money, Whether Secreted or Deposited in Bank, is not subject to levy under execution. (Ind. App.) *De Ruiter v. De Ruiter*, 107.

See *Mandamus*.

EXECUTORS AND ADMINISTRATORS.

LIMITATION OF ACTIONS Against Administrator—Remedy of Minor Heir.—If, through the neglect of an administrator to sue, he and the minor heir are barred by the statute of limitations, the heir may recover against him or his bondsmen. (Utah) *Jenkins v. Jensen*, 783.

See *Limitation of Actions*, 4, 5.

EXPLOSIVES.

See *Druggists*.

FELLOW-SERVANTS.

See *Master and Servant*, 10.

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See *Trespass*.

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See *Adulteration; Commerce*.

FORECLOSURE.

See *Mortgages*.

FOREIGN LANGUAGE.

See *Evidence*, 6; *Perjury*, 2.

FORMER JEOPARDY.

See *Criminal Law*, 1.

FRAUD.

1. **FRAUD** is not Presumed, but must be clearly and distinctly proved by the person who asserts it. (N. J. L.) *Fivey v. Pennsylvania R. R. Co.*, 445.

2. **FRAUD—Burden of Proof.**—A person who claims that his signature to a written contract was procured by fraud has the burden of proof to clearly establish such fraud, as innocence, and not fraud, is always presumed. (N. J. L.) *Fivey v. Pennsylvania R. R. Co.*, 445.

3. **FRAUD—Evidence.**—To establish a misrepresentation that will invalidate a contract it must appear that the representation was not only false, but made with intent to deceive, and that the person seeking relief acted upon, and was misled by it. (N. J. L.) *Fivey v. Pennsylvania R. R. Co.*, 445.

4. **FRAUD MAY BE INFERRED** From Established Facts, and need not be proved by positive evidence. (Ind. App.) *De Ruiter v. De Ruiter*, 107.

FRAUDULENT CONVEYANCES.

1. **FRAUDULENT CONVEYANCES.**—Although Conveyances are Separate, and executed at different times, if done in pursuance of a common design to defraud, any fact that vitiates one will be visited upon all. (Ala.) *Russell v. Davis*, 56.

2. **FRAUDULENT CONVEYANCE—Relatives.**—The fact that a transaction, assailed by creditors as fraudulent, was between parties nearly related, is a circumstance calling for closer scrutiny than if the parties were strangers. (Ala.) *Russell v. Davis*, 56.

3. **FRAUDULENT TRANSFERS** are Valid Except as Against the Claims of Creditors whom they tend to defraud, and when a suit is brought by an administrator of a decedent to set aside a conveyance made by him in fraud of his creditors, the grantee must be permitted to retain whatever remains after satisfying the creditors. (Iowa) *Mallow v. Walker*, 158.

4. **FRAUDULENT TRANSFERS.**—A Conveyance in Consideration that the Grantee Will Support the Grantor, made when the latter had substantially no other property, is void as against his creditors. (Iowa) *Mallow v. Walker*, 158.

5. **FRAUDULENT TRANSFERS.**—The Administrator of an Estate may Maintain an Action against the grantee of the decedent to set aside a conveyance in fraud of the latter's creditors. (Iowa) *Mallow v. Walker*, 158.

6. **FRAUDULENT TRANSFERS—Who may Attack as a Creditor.** A Wife is a present and continuous debtor of her husband, and as such is within the protection of the statute against fraudulent conveyances, and may proceed to obtain relief against such a conveyance if it interferes with her right to collect maintenance and alimony. (Ind. App.) *De Ruiter v. De Ruiter*, 107.

7. **FRAUDULENT TRANSFERS—Judgment for Alimony.**—A wife who has obtained a judgment for alimony is a creditor of her husband, and as such entitled to attack a fraudulent and voluntary transfer made by him. (Ind. App.) *De Ruiter v. De Ruiter*, 107.

8. **FRAUDULENT CONVEYANCE.**—If a Debtor Prefers one of his creditors by conveying his entire estate to him, the conveyance is void as to other creditors, if the transfer is not absolute, without

benefit reserved, if the property is in excess of the demand, if the debt is fictitious in whole or in part, or if any cash consideration is given. (Ala.) *Russell v. Davis*, 56.

9. **FRAUDULENT CONVEYANCE**.—The Burden of Proof is upon the grantee in a conveyance, assailed by a creditor as fraudulent, to show the bona fides of the transaction. (Ala.) *Russell v. Davis*, 56.

10. **FRAUDULENT TRANSFERS**.—Relief Against.—Where a wife has obtained a decree divorcing her from her husband, awarding alimony, and declaring a conveyance made by him to be fraudulent and void as against her, the court may also direct a sale of the property so conveyed, and the application of the proceeds to the payment of the amount due her. (Ind. App.) *De Ruiter v. De Ruiter*, 107.

GUARDIAN AND WARD.

GUARDIAN'S SALE.—When not Void for Failure to Give Bond.—Though a statute requires a guardian, before making a sale of the property of his ward, to give a specified bond for the application of the proceeds, a sale made without giving such bond, but subsequently confirmed by the court, is not void. (Mont.) *Hughes v. Goodale*, 410.

HABEAS CORPUS.

1. **HABEAS CORPUS**.—Under this Writ Nothing Will be Inquired into if the Prosecutor is in Custody Under Process, except the validity of the process on its face and the jurisdiction of the court issuing it. (Ark.) *Ex parte Foote*, 63.

2. **HABEAS CORPUS**.—Inquiry into Upon the Authority of a Court.—On habeas corpus it may be shown that the court under whose judgment or order the prisoner is deprived of his liberty had no legal existence or is not a court of competent jurisdiction. (Kan.) *In re Norton*, 255.

HEALTH.

1. **MUNICIPAL CORPORATIONS**.—Public Health.—Construction of Powers Conferred.—Powers conferred by statute upon municipalities or boards of health to secure the preservation of the public health, and to provide for the enforcement of all proper and necessary sanitary regulations, and for the summary suppression of all conditions detrimental to the lives and health of the people, should, notwithstanding the individual liberty of the citizen is in a large measure involved, receive a broad and liberal construction in aid of the beneficial purposes of their enactment. (Minn.) *State v. Zimmerman*, 351.

2. **MUNICIPAL CORPORATIONS**.—Vaccination.—A broad and comprehensive delegation of power by statute to municipalities or health boards to do all acts and make all regulations for the preservation of the public health as are deemed expedient, confers upon the proper authorities power to make and enforce a regulation that in cases of emergency caused by an epidemic of smallpox, all children shall be required to be vaccinated as a condition precedent to their admission to the public schools. (Minn.) *State v. Zimmerman*, 351.

HEIRS.

See Covenants; Limitation of Actions.

HIGHWAYS.

NEGLIGENCE—Leaving Horse Untied in Street.—It is not negligence for the driver of a quiet, gentle horse to leave him untied and otherwise unattended on the side of a public street or highway, as he is accustomed to do without accident, and with nothing of an unusual character present to alarm the horse while the driver is near by loading goods into the wagon to which the horse is hitched. (N. J. L.) *Belles v. Kellner*, 429.

HOMESTEAD.

HOMESTEAD—Statute of Limitations—Payments Made by Husband.—If a husband and wife execute a mortgage on their homestead to secure the payment of a note made by him only, his payment of interest from time to time, though without her knowledge, prevents the running of the statute of limitations, and the mortgage may be foreclosed in a suit commenced more than five years after the note became due. (Kan.) *Skinner v. Moore*, 244.

Homestead, statute of limitations on liens against husbands, power to suspend the running of, 247.

See Public Lands, 2.

HOMICIDE.

1. **MURDER**—Indictment—Evidence of Felony.—Under an indictment for murder in the first degree simply charging the offense as willful, deliberate, and premeditated, any evidence is admissible which tends to show the facts of the killing, and also that the homicide was committed in the perpetration of a robbery, which by statute is made murder in the first degree. The indictment need not specifically allege that the homicide was committed in the perpetration of a robbery to admit proof of that fact. (Utah) *State v. King*, 808.

2. **MURDER**—Conspiracy to Rob.—If two persons are associated together for the purpose of robbing a person, who is killed by one of them, either or both are chargeable with the murder, whether he or his companion fired the fatal shot. (Utah) *State v. King*, 808.

3. **HOMICIDE**—Killing Attempted Robber.—A person upon whom an attempt to rob is being made is justified in killing his assailant, without attempting to use other or less radical means, or to retreat, even though such means may be resorted to with entire safety to himself, and would manifestly be successful. (N. J. L.) *State v. Bonfiglio*, 423.

4. **HOMICIDE**—Murder—Deliberation.—The presence of a specific intent to take life is not, standing alone, conclusive that the homicidal act was done with deliberation and premeditation. (N. J. L.) *State v. Bonfiglio*, 423.

5. **HOMICIDE**—Justifiable.—A man may protect himself against assault, even to the extent of taking the life of his adversary, when that act is, or reasonably appears to be, necessary to the preservation of his own life or to protect himself from serious bodily harm. (N. J. L.) *State v. Bonfiglio*, 423.

6. **JURY TRIAL**—Instructions Postulating an Acquittal upon self-defense, which are argumentative, or which omit some constituent element of self-defense are properly refused. (Ala.) *Campbell v. State*, 17.

HUNTING.

See Trespass.

HUSBAND AND WIFE.

HUSBAND AND WIFE—Confidential Relations of.—A wife has a right to rely upon confidential relations existing between her and her husband, and is, therefore, excused in not reading papers presented to her by him, to ascertain whether his representations respecting their nature and purpose are true, and if such representations were false, she is not precluded from obtaining relief in equity by the fact that she executed the papers without ascertaining that their contents were not as so represented. (Ind. App.) *De Ruiter v. De Ruiter*, 107.

See Divorce.

ICE.

See Constitutional Law, 9-11; Navigable Waters.

INDEMNITY.

See Insurance.

INDEPENDENT CONTRACTOR.

See Master and Servant, 8.

INDICTMENT.

See Homicide; Larceny; Perjury.

INFANTS.

1. INFANTS—The Plea of Infancy is not Always a Privilege Personal to an Infant.—Its chief application is for his protection in cases where the adult seeks to avoid his contract on that ground when it has not been disaffirmed by the infant. It cannot be relied upon for the purpose of showing that an infant is bound by a warranty in a contract of insurance, he having died before disaffirming it. (R. I.) *O'Rourke v. Hancock Mut. Life Ins. Co.*, 643.

2. CONTRACTS OF INFANTS—Liability for Tort.—If an infant's tort is subsequent to, or independent of, his contract and not a mere breach thereof, but a distinct, willful, and positive wrong in itself, then, notwithstanding the contract, the infant is liable. (Tenn.) *Lowery v. Cate*, 744.

3. CONTRACTS OF INFANTS—Liability for Negligent Breach of.—If an infant contracts to thresh grain, and in performing the work negligently uses an engine without a spark-arrester, placed so near that it sets fire to and burns the grain and the shed containing it, he is not liable for the loss, without proof that his act was a willful and intentional wrong, done independently of, and outside of, the contract. (Tenn.) *Lowery v. Cate*, 744.

4. CONTRACTS OF INFANTS—Liability for Tortious Breach of Contract.—While an infant is liable for his independent tort, he is not liable for the tortious consequences of his breaches of contract, though the action may be in form as for a tort, so long as

the subject of the suit is based on the contract. (Tenn.) Lowery v. Cato, 744.

5. **CONTRACTS OF INFANTS—Repudiation.**—A minor cannot repudiate a contract made for his benefit without returning the property in his possession obtained by and through it. (Utah) Jenkins v. Jensen, 788.

6. A **MINOR** may Disaffirm and Avoid a Contract by him made for the purchase of a bicycle of which he has had possession and use, and recover a sum which he paid on account of such purchase without putting the other party in statu quo or allowing anything for the rent and use of the property while in his possession under the contract of purchase, though the reasonable value of the use of the bicycle was equal to the sum paid by him on account of its purchase. (Mass.) Gillis v. Goodwin, 265.

See Death, 8; Limitation of Actions; Negligence; Street Railways.

INJUNCTION.

See Appeal and Error, 1; Municipal Corporations; 9.

INSANE PERSONS.

WANT OF MENTAL CAPACITY is not Made Out where it appears that the party in question had sufficient mind to determine for himself what he wanted to do, and to carry out his purpose with reference to the disposition of the property owned by him, though he acts upon an antipathy suddenly formed. (Iowa) Mallow v. Walker, 158.

INSTRUCTIONS.

See Trial.

INSURANCE.

1. **RAILWAYS—Insurance of Against Liability for Accident—When Does not Include Death of Passenger.**—Under a policy insuring a railway corporation "against loss from liability to any person who may, during the period of twelve months, accidentally sustain bodily injuries while traveling on any railway of the insured under circumstances which shall impose upon the insured a common law or statutory liability for such injuries," there can be no recovery because of an accident due to the fault of the insured, if the person injured dies instantly and without conscious suffering. (Mass.) Worcester etc. Ry. Co. v. Travelers' Ins. Co., 275.

2. **INSURANCE—Estate of Deceased.**—A policy insuring the "estate" of a deceased person against loss by fire is valid and enforceable. (Minn.) Magoun v. Fireman's Fund Insurance Co., 370.

3. **INSURANCE—Mortgage Clause.**—A policy of insurance providing that if it shall be made payable to a mortgagee of the insured property, no act or default of any person except such mortgagee, his agents, or those claiming under him, shall affect the right of the mortgagee to recover in case of loss, which shall be payable to a certain named person, mortgagee, as his interest may appear, gives to such mortgagee independent insurance, which cannot be destroyed by any act or default of the mortgagor, or of any

person except the mortgagee, his agent, or privies' (Minn.) *Magoun v. Fireman's Fund Ins. Co.*, 370.

4. **INSURANCE—Change in Title.**—If an agreement under which a mortgagee is to receive a conveyance of insured premises in satisfaction of the mortgage debt is not fully consummated prior to loss under the policy, there is no change in the legal title to the property, so as to constitute that a ground for the avoidance of the policy. (Minn.) *Magoun v. Fireman's Fund Ins. Co.*, 370.

5. **INSURANCE—Failure of Agent to Disclose Facts—Excessive Insurance.**—If an insurance agent is part owner of the insured property as heir to one deceased subsequently to the execution of a mortgage on the property, and also one of the makers of the mortgage note, his failure when issuing the policy to notify his company of these facts, or that there was a prior policy upon the property issued to such mortgagee, does not void the policy last issued, although the amount of insurance is in excess of the amount permitted as concurrent insurance. (Minn.) *Magoun v. Fireman's Fund Ins. Co.*, 370.

6. **INSURANCE, LIFE—Agent Procuring Insurance, Who Deemed to be the Agent of.**—An agent, in simply procuring insurance, is deemed to be the agent of the applicant, and not of the insurer, and the applicant is answerable for his mistakes and false answers. Testimony of what was said to and by the solicitor is, therefore, immaterial. (R. I.) *O'Rourke v. Hancock Mut. Life Ins. Co.*, 643.

7. **INSURANCE, LIFE—Warranty—Burden of Proof.**—Answers in an application for life insurance respecting the previous illness of the insured and his consulting physicians, and the like, are warranties which must be proved by the plaintiff, but which, for convenience of trial, may stand on presumption of prima facie evidence until contradicted. (R. I.) *O'Rourke v. Hancock Mut. Life Ins. Co.*, 643.

8. **INSURANCE, LIFE—Insurer, Whether Bound to Have Present Knowledge of Its Files.**—Where the answers of an applicant for life insurance stated that the insuring corporation had never refused an insurance on his life, a recovery cannot be defeated on the ground that such answer was false, if the corporation, by an examination of its files, must have seen that a previous application on behalf of the same person had been by it rejected. (R. I.) *O'Rourke v. Hancock Mut. Life Ins. Co.*, 643.

9. **INSURANCE, LIFE—Answers of Applicant Known by the Insurer to be False.**—Where an insurance corporation is in actual possession of knowledge of a fact, and by turning to its own records can assure itself better than by the imperfect memory of the applicant, it is a perversion of the purpose of warranty to allow it to avoid its contract. (R. I.) *O'Rourke v. Hancock Mut. Life Ins. Co.*, 643.

10. **INSURANCE, LIFE.—An Infant is not Bound by His Warranties in a Contract of Insurance.** Hence a policy insuring his life cannot be defeated, where he has died before his majority, by proving that the answers made to questions propounded in the application were false. (R. I.) *O'Rourke v. Hancock Mut. Life Ins. Co.*, 643.

11. **INSURANCE, LIFE—Estoppel Against Beneficiary.**—Where a policy issues insuring the life of a minor, containing warranties which are not binding on him because of his infancy, the beneficiary is not, upon the minor's death, estopped from recovering on the

policy, if she did not procure the insurance with knowledge of the false statement. (R. I.) *O'Rourke v. Hancock Mut. Life Ins. Co.*, 643.

12. INSURANCE, LIFE—Reimbursement for Premiums Paid.—An assignee of a life insurance policy who pays premiums thereon is entitled to reimbursement therefor out of the proceeds of the policy, with interest. (Tenn.) *Insurance Co. v. Dunscomb*, 769.

13. INSURANCE, LIFE—Insurable Interest—Statute of Limitations.—The fact that the debtor may be armed with a legal defense, such as the statute of limitations, against the creditor, does not destroy the insurable interest of the latter in the life of the former, either as absolute payment or as collateral security, nor defeat his right to recover on insurance on the debtor's life in his favor. (Tenn.) *Insurance Co. v. Dunscomb*, 769.

14. INSURANCE, LIFE—Insurable Interest—Statute of Limitations.—If a creditor takes insurance on the life of his debtor, either as payment or as collateral security, the fact that the debt is barred by limitation at the time the insurance is taken, or becomes barred or affected with a presumption of payment before the policy becomes payable, does not prevent the creditor from recovering the insurance, either as against the insurer or the personal representatives of the insured. (Tenn.) *Insurance Co. v. Dunscomb*, 769.

15. INSURANCE, LIFE.—A Creditor has an Insurable Interest in the life of his debtor to the extent of the indebtedness. (Tenn.) *Insurance Co. v. Dunscomb*, 769.

16. INSURANCE—Accident—Death by, What Evidence Sufficient to Prove.—If it appears that a passenger on a railway train, intending to alight at a crossing, left his seat while the train was running, went to the steps, and, descending them, stood on the lower, holding the railing with both hands, and he was next seen acting as if he was going to step down another step, and next holding the railing with one hand, and being dragged, the jury is authorized to find that his resulting injuries were accidental. (Iowa) *Smith v. Aetna Life Ins. Co.*, 153.

17. INSURANCE, ACCIDENT—Exposure to Unnecessary Danger. The Burden of Proof is on the defendant to show that an accident causing death resulted, in whole or in part, from voluntary exposure to unnecessary danger. (Iowa) *Smith v. Aetna Life Ins. Co.*, 153.

18. INSURANCE, ACCIDENT.—Voluntary Exposure to Danger Means something more than negligence proximately contributing to the injury. The test seems to be, did the insured appreciate that, by doing the act, he was putting life and limb in hazard. (Iowa) *Smith v. Aetna Life Ins. Co.*, 153.

19. INSURANCE AGAINST ACCIDENT.—Voluntary Exposure to Danger is not Proved by evidence tending to show that the insured stood on the steps of a moving train, holding on with both hands, and fell or stepped therefrom in the belief that he was stepping on a lower step, which in fact did not exist. (Iowa) *Smith v. Aetna Life Ins. Co.*, 153.

20. INSURANCE, ACCIDENT.—One making preparations to leave a train at a place elsewhere than the depot, if the train should stop, is not guilty of a violation of law, and does not break the conditions of a policy of insurance exempting the insurer from liability for injuries sustained in acts in violation of law, nor does he violate the condition of the policy exempting the insurer from liability for

injuries suffered by the insured while entering or leaving a moving conveyance. (Iowa) *Smith v. Aetna Life Ins. Co.*, 153.

Insurance, interpleader, bills of to determine to whom insurance money should be paid, 612, 613.

See Interpleader, 2.

INTEREST.

1. **INTEREST**, After the Breach of a Contract, is recoverable only as damages. (Or.) *Close v. Riddle*, 580.

2. **INTEREST**—Higher Rate After Default.—A stipulation in a bond and mortgage for a higher rate of interest after maturity, such rate not being usurious, is for liquidated damages, and not a penalty, and is enforceable in equity. (Or.) *Close v. Riddle*, 580.

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See Damages, 3; Officers, 7; Usury.

INTERPLEADER.

1. **INTERPLEADER**.—The Office of an Interpleading suit is not to protect a party against a double liability, but against double vexation in the case of one liability. (R. I.) *Connecticut Mut. Life Ins. Co. v. Tucker*, 590.

2. **INSURANCE CORPORATION**.—When Cannot Compel Claimants Under Two Policies to Interplead.—If a life insurance company issues a policy upon the life of A, payable to B, but if B should not survive A, then to B's children, and permits B, then having children, to assign to A, and thereupon issues a new policy payable to the estate of A, the corporation cannot, on the death of A, main-

tain a bill of interpleader against the persons claiming under the two policies, because it may be liable on both. (R. L.) Connecticut Mut. Life Ins. Co. v. Tucker, 590.

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INTERSTATE COMMERCE.

See Commerce.

JUDGMENTS.

1. JUDGMENTS—When Voidable or Void.—The orders and judgments of a court, within its jurisdiction, may be voidable for error or irregularity, but such error or irregularity does not of itself make them void. (Mont.) *Hughes v. Goodale*, 410.

2. JUDGMENTS Void as to One, Whether Void as to All.—At common law a judgment in an action ex delicto, against two or more defendants jointly and severally liable, though void as to one of them for want of jurisdiction, is not necessarily void as to the other or others. (Minn.) *Engstrand v. Kleffman*, 359.

3. RES JUDICATA.—A Judgment Against a Holder of a Negotiable Instrument, for noncompliance with the statute, requiring it to be on a printed form and to show the consideration, does not bar an action for the purchase price of the article on account of which the instrument was executed. (Ark.) *Roth v. Merchants' etc. Bank*, 80.

4. JUDGMENTS OF NATIONAL COURTS as Res Judicata in State Courts.—If a judgment in favor of plaintiff in a national court is reversed on appeal, and the cause remanded for a new trial, whereupon plaintiff takes a voluntary nonsuit and brings a new action in the state court, the judgment of the national court is not conclusive, either as res judicata, or as a declaration of the law of the case, in the prosecution of the latter action. (Tenn.) *Railroad v. Bentz*, 763.

5. COLLATERAL ATTACK.—A Judgment by Default, erroneous in granting relief not demanded, is not void and open to collateral attack. (S. Dak.) *Mach v. Blanchard*, 698.

6. JUDGMENT—Merger—Limitations Upon the Effect of.—A judgment upon a cause of action which is exempt from the operation of a discharge in bankruptcy is not, by operation of the law of merger, brought within the effect of the discharge. (R. I.) *McDonald v. Brown*, 659.

7. REVERSAL OF JUDGMENT.—A Mortgage is Nullified by the reversal of a judgment on which the mortgagor's title rested. (S. Dak.) *Mach v. Blanchard*, 698.

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LACHES.

LACHES—Rule of Does not Apply to Legal Actions.—The doctrine of laches does not apply to a case in which the plaintiff does not ask equitable relief, but seeks in a court of law to enforce a plain legal title in an action not barred by any statute of limitations. (Ark.) *McFarlane v. Grober*, 84.

LARCENY.

1. **LARCENY—Indictment.**—The Ownership of Property Stolen from a Partnership is sufficiently laid in one of the members of the firm. (Ala.) *Smith v. State*, 21.
2. **LARCENY—Proof of Corpus Delicti.**—If the evidence affords an inference of larceny, its sufficiency is for the jury, and it is their province to determine whether the corpus delicti has been proved. In such case, evidence of possession by the prisoner of goods of the same kind as those charged to have been stolen is competent. (Ala.) *Smith v. State*, 21.
3. **LARCENY—Admissibility of Evidence.**—In a prosecution for larceny, evidence of the defendant's opportunity of aiding the owner's employé in committing the theft, or of his opportunity of receiving the goods from such employé, is admissible. (Ala.) *Smith v. State*, 21.

4. **LARCENY**—Possession of Goods.—Until the Prosecution has shown a *prima facie* larceny, it is not entitled to introduce evidence of possession by the defendant of the goods alleged to have been stolen. (Ala.) *Smith v. State*, 21.

5. **LARCENY**.—The Unexplained Possession by one person of goods belonging to another does not raise a presumption that a larceny has been committed and that the possessor is a thief. (Ala.) *Smith v. State*, 21.

6. **LARCENY**.—The Unexplained Possession of Property recently stolen does not, as a matter of law, raise a presumption of guilt. (Ala.) *Smith v. State*, 21.

LIBEL AND SLANDER.

1. **A LIBEL Must be Deemed a Willful and Malicious Act**, and injurious to the property of another within the meaning of the statutes of the United States, declaring what causes of action are released by a discharge in bankruptcy. (R. I.) *McDonald v. Brown*, 659.

2. **LIBEL**.—Liability for Libel is not Released by Discharge in Bankruptcy, because statutes of the United States exempt from the effect of such release, all judgments in actions for willful and malicious injury to the person or property of another. (R. I.) *McDonald v. Brown*, 659.

3. **PRACTISE**—Slander—Motion to Make Complaint More Definite and Certain.—If a complaint containing two or more counts alleges a speaking by the defendant of the different slanderous words stated in the several counts, the plaintiff, on motion of the defendant, should be required to make his complaint more definite and certain by showing therein whether the charges made in such counts all relate to words spoken in the same conversation. (Kan.) *Thompson v. Harris*, 187.

4. **SLANDER**.—Charging one with being "a dirty old whore" is not justified by proof of adultery on different occasions with the same person, if the jury is of the opinion that the charge meant that plaintiff made merchandise of her person, for hire. (Mass.) *Rutherford v. Paddock*, 282.

5. **SLANDER**—Different Words—When Give Rise to but One Cause of Action.—If several slanderous charges are all made in a single conversation, though relating to distinct offenses, they constitute but one cause of action. (Kan.) *Thompson v. Harris*, 187.

6. **SLANDER**—Pleading.—The justification of slanderous words must be as broad as the charge. (Mass.) *Rutherford v. Paddock*, 282.

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LICENSES.

- 1. EASEMENT AND LICENSE DISTINGUISHED.**—An easement is a permanent interest in realty, while a license is a personal privilege to do certain acts upon the land of another without possessing any estate therein. (Ala.) *Hicks v. Swift Creek Mill Co.*, 38.
- 2. EASEMENT AND LICENSE—How Created.**—An easement must be created by deed or prescription, while a license may be by parol. (Ala.) *Hicks v. Swift Creek Mill Co.*, 38.
- 3. A LICENSE is Generally Revocable at the will of the owner of the land in which it is enjoined.** (Ala.) *Hicks v. Swift Creek Mill Co.*, 38.
- 4. LICENSE—Estoppel to Revoke.**—One who gives verbal permission to construct a ditch and dam upon his land is not estopped to revoke the license, because the licensee incurs great expense in their construction. (Ala.) *Hicks v. Swift Creek Mill Co.*, 38.
- 5. LICENSE—Revocation by Conveyance.**—The conveyance of land upon which a third person has constructed a ditch and dam under a verbal permission from the land owner operates as a revocation of the license. (Ala.) *Hicks v. Swift Creek Mill Co.*, 38.
- 6. LICENSEE—Damages Against.**—The Grantee of land whereon a third person, by the verbal permission of the owner, had constructed a ditch and dam, may maintain trespass against the licensee for damages suffered, and the recovery may include exemplary damages. (Ala.) *Hicks v. Swift Creek Mill Co.*, 38.

LICENSE TAX.

See Taxation, 1.

LIENS.

- 1. LIEN—When not Waived by Demanding a Sum Greater than that Due.**—If one entitled to retain personal property until a lien in his favor thereon is paid demands a sum exceeding that due him, he does not thereby waive his lien nor forfeit his right to retain possession of the property, if his demand was made in good faith and in the belief that he was entitled to such sum, and no payment or tender was made of the amount actually due. (Mass.) *Folsom v. Barrett*, 320.

2. LIENHOLDER—Right of to the Expenses of Keeping Property.—The owner of a horse which another is holding as security for the payment of a debt is personally liable for the expenses of keeping such horse after a demand made for its possession, and a demand in good faith by the lienholder of a sum in excess of that due, if such owner does not tender the sum due, and such tender is not waived. (Mass.) *Folsom v. Barrett*, 320.

3. TENDER of Amount to Satisfy a Lien, when not Waived.—Though a lienholder states that he will not deliver personal property until paid a sum which he names, and which is in excess of that to which he is entitled, this is not a waiver of a tender of the amount actually due, where it does not appear that he had reason to believe that the other party was thinking of a tender and prepared to make it. (Mass.) *Folsom v. Barrett*, 320.

LIFE INSURANCE.

See Insurance.

LIMITATION OF ACTIONS.

1. STATUTE OF LIMITATIONS—Disability of One Plaintiff.—A married woman, against whom the statute of limitations does not run and who is a cotenant with her brother, cannot, on purchasing his share, recover the whole property if the statute of limitations has run against his claim. (Ark.) *McFarlane v. Grober*, 84.

2. LIMITATIONS OF ACTIONS—Statute, When Commences to Run.—If it is claimed that a culvert in an embankment erected by a railway company across a public highway was insufficient in size to carry away the accumulations of waters in times of heavy rains, and that by reason thereof plaintiff's lands were overflowed and damaged, the statute of limitations against his cause of action therefor commences to run at the date of his suffering the injury, and not at the date of the completion of the embankment and culvert. (Ind. App.) *Kelly v. Pittsburgh etc. R. R. Co.*, 134.

3. LIMITATION OF ACTIONS—Subsequent Disability.—If the statute of limitations once commences, it does not cease to run on account of any subsequent liability, unless such disability comes within the exception of the statute. (Utah) *Jenkins v. Jensen*, 783.

4. LIMITATION OF ACTIONS—Administrator and Minor Heir.—If an administrator neglects to bring an action to recover property of the estate until it is barred under the statute of limitations, the heir is also barred, though he is a minor at the time the action accrues to the administrator. (Utah) *Jenkins v. Jensen*, 783.

5. LIMITATION OF ACTION Against Posthumous Heir.—If the right of an administrator to sue is barred by limitation, the right of a posthumous heir represented by him, and born after his appointment is also barred, and his infancy does not stop the running of the statute. (Utah) *Jenkins v. Jensen*, 783.

6. CERTIFICATE OF DEPOSIT.—The Statute of Limitations does not begin to run against a certificate of deposit until a demand for payment. (S. Dak.) *Tobin v. McKinney*, 694.

7. CERTIFICATE OF DEPOSIT.—The Statute of Limitations does not begin to run on a certificate of deposit until payment has been demanded. (S. Dak.) *Tobin v. McKinney*, 688.

See Adverse Possession; Bailment; Covenants, 3; Executors and Administrators; Homesteads; Insurance, 13, 14; Nuisance, 3; Officers, 3; Principal and Surety, 2; Trusts; Waters and Watercourses.

LIQUIDATED DAMAGES.

See Municipal Corporations, 2.

MAINTENANCE.

See Divorce.

MANDAMUS.

1. **MANDAMUS** does not lie to Compel a Clerk of a Court to Issue an Alias Execution or Order of Sale, because there is a complete and adequate remedy by motion in the cause in which the clerk is desired to act. (Mont.) State v. Wright, 421.

2. **MANDAMUS** may Issue Against a Public Officer of the State if the duty to be performed is purely ministerial, though it is conceded that the state is not directly subject to suit. (Mont.) State v. Toole, 386.

3. **MANDAMUS** may Issue to Compel a State Furnishing Board to execute a contract which it has awarded to the lowest responsible bidder. (Mont.) State v. Toole, 386.

MARRIAGE.

See Divorce.

MASTER AND SERVANT.

1. **MASTER AND SERVANT**—Condition of Premises.—An instruction that it is the duty of the master to keep the premises about which the servant is employed in as reasonably safe condition as they would have been kept by a person of ordinary prudence under the same circumstances, considering the nature of the work to be accomplished, presents a correct proposition of law, without limiting the jury to a consideration of the condition of the premises at the very place where the accident happened to the servant and the injury was received, especially when the inquiry has not been to any other part of the premises. (Utah) Downey v. Gemini Min. Co., 798.

2. **MASTER AND SERVANT**—Condition of Premises.—An instruction that it is the duty of the master to keep the premises about which the servant is employed in as reasonably safe condition as they would be kept by a person of ordinary prudence under the same circumstances, considering the nature of the work to be performed, states a correct proposition of law, without the addition of the words "skilled in the business" after the words "person of ordinary prudence." (Utah) Downey v. Gemini Min. Co., 798.

3. **MASTER AND SERVANT**—Duty as to Condition of Premises.—A servant in his employment has a right to assume that the master will conduct his business as respects the servant's safety with ordinary prudence and care, and that if he makes the place where he is employed or is required to pass to his work dangerous and unsafe, which was before reasonably safe, and the servant has no knowledge or duty to know of the changed conditions, that the master will warn him of such danger in time to prevent his injury. Failing in this, the master must respond in damages to the servant injured while exercising due care. (Utah) Downey v. Gemini Min. Co., 798.

4. MASTER AND SERVANT.—If a Master Creates a Dangerous Place on his premises unknown to the servant, and fails to warn him thereof, the servant, who is injured by venturing into such dangerous place while in the exercise of ordinary care, is not guilty of contributory negligence. (Utah) *Downey v. Gemini Min. Co.*, 798.

5. MASTER AND SERVANT—Negligence—Risk Assumed.—If the danger causing the accident is a peril incident to the employment, and the injury is not caused by a want of ordinary care on the part of the master, then it is a risk assumed by the servant, and he cannot recover, but if the contrary state of facts is true, he is entitled to recover if he is injured without fault on his part. (Utah) *Downey v. Gemini Min. Co.*, 798.

6. MASTER AND SERVANT.—Ordinary Care as between master and servant simply implies and includes the exercise of such reasonable diligence, care, skill, watchfulness, and forethought as, under all of the circumstances of the particular service, a careful, prudent man or officer of a corporation would exercise under the same or similar circumstances. By the term "similar circumstances" is meant to include all the circumstances of time, place and attendant conditions. (Utah) *Downey v. Gemini Min. Co.*, 798.

7. MASTER AND SERVANT.—Presumption of Negligence on the part of the master does not arise from the mere happening of an accident to his servant. Negligence is not presumed, but is an affirmative fact, which must be proved by a preponderance of the evidence. (Utah) *Downey v. Gemini Min. Co.*, 798.

8. INDEPENDENT CONTRACTOR—Negligence of.—If an independent contractor leaves an excavation unguarded in a public street, the property owner is liable to one injured by falling into it. (S. Dak.) *McCarrier v. Hollister*, 695.

9. MASTER AND SERVANT—Fellow-servants.—An ordinary day laborer in a mine and the foreman thereof are not fellow-servants. (Utah) *Downey v. Gemini Min. Co.*, 798.

10. MASTER AND SERVANT—Fellow-servants.—The negligence of a railroad telegraph operator in transmitting running orders to men in charge of a train is not one of the risks assumed by the latter, as they are not fellow-servants with such operator. (Tenn.) *Railroad v. Bentz*, 768.

11. MASTER AND SERVANT—Medical or Surgical Aid—Duty to Furnish.—An employer does not owe to his servant or employé a duty to furnish medical or surgical aid to him or to nurse him when sick, disabled, or injured while working for the master or employer. (Mont.) *Spelman v. Gold Coin Min. Co.*, 402.

See Principal and Agent, 3.

MEDICAL SERVICES.

See Physicians and Surgeons.

MERGER.

See Judgments, 6.

MINES AND MINERALS.

1. MINES—Extralateral Rights.—The holder of a mining location within which a vein apexes owns the whole of the vein, and may

follow its dips and angles when it dips under and leads without the side lines of his claim as marked on the surface. (Wash.) Cedar Canyon Consolidated Min. Co. v. Yarwood, 841.

2. **MINING.**—A Lead, Lode, or Vein, as Those Words are Used in the Acts of Congress, Means any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rocks. It must be continuous in the sense that it can be traced through the surrounding rock, though slight interruptions in the mineral-bearing rock would not alone be sufficient to destroy the identity of the vein. Neither would a short partial closure of the fissure have that effect, if a little farther on it recurred again with mineral-bearing rock within it. (Ark.) Buffalo Zinc etc. Co. v. Crump, 87.

3. **MINING CLAIMS.**—Abandonment is a Voluntary Act, and consists of the relinquishment of possession of the claim with an intention not to return and occupy it. It is purely a question of intention. (Ark.) Buffalo Zinc etc. Co. v. Crump, 87.

4. **MINING CLAIMS.**—Abandonment, What is not.—The quitting of work upon a mining claim temporarily, except annual assessment work, on account of lack of transportation for the ore taken from the mine, does not amount to an abandonment, though the land is entered as a homestead by a third person, but without the consent of the claimant of the mine. (Ark.) Buffalo Zinc etc. Co. v. Crump, 87.

5. **MINING CLAIMS** are not Subject to Location until the rights of the former locator have come to an end. Any relocation before that time is void. (Ark.) Buffalo Zinc etc. Co. v. Crump, 87.

6. **MINING CLAIMS.**—Descriptions in Locations of.—Where the commencement point of a mine is described in the notice of location as beginning at the "northwest corner of Ed. Williams, 1-16, at a black oak post," it will be presumed that "Ed. Williams, 1-16" is a well-known natural object, until the contrary appears. (Ark.) Buffalo Zinc etc. Co. v. Crump, 87.

7. **MINING CLAIMS.**—Failure to do the Work on a Mining Claim Within the Time Prescribed by law does not forfeit it, if the locator, before any location is made, resumes work in good faith. After that no other person has a right to locate the mine. (Ark.) Buffalo Zinc etc. Co. v. Crump, 87.

8. **MINING CLAIMS.**—Rights Acquired by Adverse Possession of. Though the lands attempted to be located as mining claims are not then subject to location because of previous locations, yet if the claimants under the junior location take possession, and hold and develop the mine by work and labor performed, and continue the adverse holding for a longer time than the period of limitations prescribed by statute, their claim is valid against everyone except the United States. (Ark.) Buffalo Zinc etc. Co. v. Crump, 87.

9. **MINING CLAIMS.**—Presumption of Regularity of Location of. As against the objection that there was no evidence of the posting of the notice of the location of a mining claim, if it appears that such claim was purchased from and conveyed by the supposed locator, and has been held by the vendee adversely to all the world for a longer time than the statutory period of limitations, it will be presumed that the location was regularly made. (Ark.) Buffalo Zinc etc. Co. v. Crump, 87.

10. **MINING CLAIMS.**—Proof of Forfeiture.—The forfeiture of a mining claim by failure of the owner to perform the annual labor required by law cannot be established except by clear and convincing evidence, and the burden of proof rests upon him who claims that a forfeiture has occurred. (Ark.) Buffalo Zinc etc. Co. v. Crump, 87.

11. MINING CLAIMS.—The Fact that Mineral is not Discovered on a mining claim until after posting the notice of location and marking the boundaries is immaterial, in the absence of intervening rights; if the discovery is the result of subsequent work, the possessory rights are complete from the date of such discovery. (Wash.) Cedar Canyon etc. Min. Co. v. Yarwood, 841.

12. MINING CLAIMS.—The Failure to Record the Notice of the Location of a Mining Claim within the time prescribed by law is not material to claimant, if the notice is recorded before any adverse right is acquired. (Ark.) Buffalo Zinc etc. Co. v. Crump, 87.

13. A COTENANT IN A MINE Cannot Question the Common Title in a contest between him and his co-owners. (Wash.) Cedar Canyon etc. Min. Co. v. Yarwood, 841.

14. COTENANCY IN MINES.—If a Cotenant in a Mining Claim purchases an interest in an adjoining claim for the benefit and protection of the common property, it inures to the benefit of the other tenants. (Wash.) Cedar Canyon etc. Min. Co. v. Yarwood, 841.

15. COTENANCY IN MINES—Purchase and Contribution.—If a cotenant in a mining claim purchases an interest in an adjacent claim for the protection of the common property, his co-owners do not lose their right to participate therein by failing to contribute to the cost, when no demand has been made on them and they have been ready, since having notice, to pay their share of the price. (Wash.) Cedar Canyon etc. Min. Co. v. Yarwood, 841.

16. COTENANCY IN MINES—Validity of the Location.—A mining location good as between the owners and the government, unless a third person can show a superior title, is property to which a cotenancy can attach. (Wash.) Cedar Canyon etc. Min. Co. v. Yarwood, 841.

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prospecting agreements are within the statutes of frauds, 856.

See Corporations, 4, 5.

MINORS.

See Infants.

MISTAKE.

See Mortgages.

MORTGAGES.

1. MORTGAGE—Application of Payments.—When payment on a mortgage is the result of compulsion, its application is not to be governed by the rules governing voluntary payments. (Iowa) Tolerton etc. Co. v. Roberts, 171.

2. MORTGAGES—Application of Proceeds of, When may be Controlled by the Mortgagee.—If a mortgage is given to secure several notes, upon some of which there are indorsers or sureties, the mortgagee is entitled to apply any moneys received from the mortgaged property on its sale to the payment of indebtedness not otherwise secured. (Iowa) Tolerton etc. Co. v. Roberts, 171.

3. MUTUAL MISTAKE OF LAW with reference to the manner in which the proceeds of mortgaged property will be applied in the event of its foreclosure does not entitle a party to relief, nor constitute a sufficient reason for not applying such proceeds as the law directs. (Iowa) Tolerton etc. Co. v. Roberts, 171.

4. MORTGAGE FORECLOSURE—Application of Proceeds.—If a mortgage given to secure four notes, upon two of which is a surety, is foreclosed, the surety is entitled to have the proceeds applied in just proportion to that part of the debt for which he is bound. (Ala.) Bostick v. Jacobs, 36.

5. MORTGAGE FORECLOSURE—Disposal of Proceeds.—Directing the remainder of the proceeds of a mortgage foreclosure, after satisfying the sum due the plaintiff, to be deposited in court subject to its further order, is not reversible error. (Or.) Close v. Biddle, 580.

See Chattel Mortgages; Constitutional Law, 4; Judgments, 7.

MUNICIPAL CORPORATIONS.

1. **MUNICIPAL CORPORATIONS—Charters of.**—The various and proper provisions of a municipal charter, legally framed, enacted and adopted by a city, have all the force and effect of legislative enactments, and may properly include provisions relating to the preservation of the public health. (Minn.) *State v. Zimmerman*, 3^d L.

2. **MUNICIPAL CORPORATIONS—Ultra Vires.**—A municipal corporation is not liable for an act wholly beyond the scope of its powers, but it is answerable for a wrongful act done in the execution of its authority. (Wash.) *Wendel v. Spokane County*, 825.

3. **BOND to Comply with Franchise—Liquidated Damages.**—If a city grants the use of its streets to one proposing to construct an electric light plant, and exacts a bond from him conditioned for the completion of the plant within a certain time, the sum therein specified is liquidated damages, and recoverable without proof of actual damage. (Or.) *Salem v. Anson*, 485.

4. **BOND to Comply with Franchise—Power to Exact.**—Under a charter authorizing a city to grant the use of its streets to those desiring to furnish it with light, a bond may be exacted from the grantee of such privilege conditioned for the completion of his plant within a specified time. (Or.) *Salem v. Anson*, 485.

5. **EJECTMENT—Poles and Appliances for Lighting Street.**—The owner of the soil in a public street cannot maintain ejectment against a person occupying part of the street with poles and appliances for lighting it, under a contract made by the city and authorized by statute, and if he uses such appliances wrongfully for private lighting in addition to their public use, he does not thereby lose his right to maintain them, but is liable to an action by the owner of the soil for an injunction, or for damages. (N. J. L.) *French v. Robb*, 433.

6. **EJECTMENT—Poles and Appliances in Street.**—A person who has rightfully placed poles and appliances in a public street for the purpose of lighting it, has no such right to the use of the street in the immediate vicinity for the purpose of supporting the poles as will support a plea of not guilty in an action of ejectment by the owner of the soil in the street. (N. J. L.) *French v. Robb*, 433.

7. **MUNICIPAL CORPORATIONS—Liability of for Accumulating and Casting Water upon Private Lands.**—The accumulation in one channel of a large stream of water by the act of a city places upon it the duty to see that suitable provision is made for the escape of the water without injury to private property, and if, by reason of the insufficiency of the drain or other means provided, the accumulated waters are cast upon private property to its injury, the municipality is liable. (Ind. App.) *Kelly v. Pittsburgh etc. R. R. Co.*, 134.

8. **NUISANCES—Power of Municipal Corporations to Declare What are.**—Under a statute authorizing municipal corporations to prevent annoyances within their limits from anything dangerous, offensive, or unhealthy, and to cause nuisances to be abated, they have power to prevent and abate nuisances, but not to declare anything to be a nuisance, which is not so in fact. (Ark.) *Ex parte Foote*, 63.

9. **EASEMENT OF VIEW from Street.**—An adjoining owner may sue to restrain the erection of a building which, encroaching upon the public street, obstructs his easement of view. (Ala.) *First Nat. Bank v. Tyson*, 46.

10. **NUISANCE**.—A Municipal Corporation Cannot License the erection or the commission of a nuisance in or on a public street. (Ala.) *First Nat. Bank v. Tyson*, 46.

11. **NUISANCE**.—Building into Street.—An Adjoining Owner, who sustains special damages, apart from those suffered by the general public, may sue to restrain the erection of columns of a building which will encroach upon the sidewalk. (Ala.) *First Nat. Bank v. Tyson*, 46.

12. **NUISANCE**.—Building into Street.—Columns of a building projecting some two feet onto the sidewalk are a public nuisance. (Ala.) *First Nat. Bank v. Tyson*, 46.

13. **NUISANCE**.—Building into Street.—It is no Defense to a suit by an adjoining property-owner to restrain the erection of a building encroaching upon the public street, that he has not applied without success to the public authorities for relief. (Ala.) *First Nat. Bank v. Tyson*, 46.

14. **MUNICIPAL ORDINANCES Void in Part Only**.—If a municipal ordinance requires the payment of a tax to be in gold, silver, or United States currency, when such payment should have been authorized to be made in municipal warrants, or makes unlawful discrimination between persons, these unauthorized provisions of the ordinance may be disregarded and the balance enforced. (Ark.) *Fort Smith v. Scruggs*, 100.

15. **MUNICIPAL CORPORATIONS**.—Tax for Privilege of Using Streets of.—The legislature may authorize a municipal corporation to impose a tax on the privilege of driving vehicles upon its public streets. (Ark.) *Fort Smith v. Scruggs*, 100.

16. **MUNICIPAL CORPORATIONS**.—Tax for Using Streets.—Whether may be Exacted of Residents Only.—The legislature may authorize the imposing by a municipal corporation upon its residents of a tax for keeping and using a vehicle on its streets, because, as a class, residents use such streets more than nonresidents. (Ark.) *Fort Smith v. Scruggs*, 100.

See Counties; Ejectment, 3, 4; Health.

MURDER.

See Homicide.

NAVIGABLE WATERS.

1. **NAVIGABLE WATERS** of the State have substantially the incidents of tidal waters at common law. The rights of the public therein are the same, and the state cannot interfere therewith except by police regulation. (Wis.) *Rossmiller v. State*, 910.

2. **NAVIGABLE WATERS**.—Right to Ice.—The state has no greater right to sell the ice that forms upon its navigable waters than to sell the water thereof in its liquid state, or the fish that inhabit the water, or the wild fowl that resort thereto. It can do neither. (Wis.) *Rossmiller v. State*, 910.

3. **NAVIGABLE WATERS**.—Rights to Ice.—The state has no such interest in the natural ice on its navigable waters that it can treat it as a subject for bargain or sale, or grant it away to private owners under the guise of the police power, or otherwise. It is a mere trustee of the title thereto with no power thereover except that of mere regulation to preserve the common right of all. (Wis.) *Rossmiller v. State*, 910.

4. NAVIGABLE WATERS—Right to Take Ice.—Whenever the title to beds of navigable waters is in the state for public purposes, all of the incidents of public waters at common law exist, including the public right of taking ice therefrom to the same extent as the right of taking fish. (Wis.) *Rossmiller v. State*, 910.

See Constitutional Law, 9.

NEGLIGENCE.

1. THE NEGLIGENCE of the Defendant is Always a Question for the Jury, though there is no conflict in the evidence, and it is error for the court to instruct them, as a proposition of law, that upon the conceded facts the defendant was guilty of negligence. (Or.) *Shobert v. May*, 453.

2. NEGLIGENCE is the Failure to Exercise that Degree of Care and Forethought which a prudent person might be expected to use under similar circumstances. The degree of care necessary to be exercised must always be commensurate with the danger incident to, or reasonably to be apprehended from, the instrumentalities used, and is measured by the extent of the legal duty owing to the person who might sustain injury from any neglect in the use of such agencies. (Or.) *Shobert v. May*, 453.

3. NEGLIGENCE—Care Which Must be Exercised by Storekeepers Toward their Patrons.—He who maintains a store for the sale of goods impliedly solicits patronage, and one who accepts the invitation to enter is not a trespasser nor a mere licensee, but is rightfully on the premises by invitation, and there arises in his favor a legal duty which demands reasonably safe arrangements for his protection. (Or.) *Shobert v. May*, 453.

4. EVIDENCE—Presumption of Ordinary Care.—It is presumed that all men will, under ordinary circumstances, act with due care, but this presumption is not indulged if circumstances arise such as should convince a reasonable man that such care was not being exercised. (Utah) *Downey v. Gemini Min. Co.*, 798.

5. NEGLIGENCE is Failure to Observe, for the protection of another's interests and safety, such care, precaution, and vigilance as the circumstances justly demand, and the want of which causes him injury. (Utah) *Downey v. Gemini Min. Co.*, 798.

6. NEGLIGENCE—Failure to Define.—In an action to recover for personal injury to a servant, a failure to specifically define negligence in an instruction is not error when the instructions as a whole must have conveyed to the jury the meaning of the term. (Utah) *Downey v. Gemini Min. Co.*, 798.

7. NEGLIGENCE—Contributory.—It is not contributory negligence not to look out for danger when there is no reason to apprehend any. (Utah) *Downey v. Gemini Min. Co.*, 798.

8. NEGLIGENCE—Child, When Guilty of Contributory.—A boy twelve years of age, of capacity and experience usual to boys of his years, is guilty of contributory negligence, if, while engaged in the street in a game with other boys, he dodges rapidly into a collision with a slowly approaching team, when chasing another boy, and without taking any measures to ascertain the approach of vehicles or to otherwise avoid danger. (Mass.) *Gleason v. Smith*, 261.

9. NEGLIGENCE, CONTRIBUTORY—Evidence to Rebut.—Slight, positive testimony, whether circumstantial or otherwise, when taken in connection with the instinct of self-preservation and the desire

to avoid pain or injury to one's self, may be sufficient to support the conclusion that one who suffered injury did not help to bring it upon himself. (Ind. App.) Pittsburgh etc. Ry. Co. v. Parish, 120.

10. NEGLIGENCE—Care Which Land Owner Must Take to Prevent Injury by His Property.—Where a certain lawful use of property will bring to pass wrongful consequences from the condition in which the property is put, if these are not guarded against, an owner who makes such a use is bound at his peril to see that proper care is taken in every particular to prevent the wrong. (Mass.) Ainsworth v. Larkin, 314.

11. BUILDINGS, Dangerous Walls, Liability for.—If, through the destruction of a building by fire, the title to the third story of the wall thereon vests in the owner of the land, he does not immediately become liable, but, before liability grows up against him, he is entitled to a reasonable time to make necessary investigations and to take such precautions as are required to prevent the wall from doing harm. (Mass.) Ainsworth v. Larkin, 314.

12. NEGLIGENCE in Failing to Remove Walls Destroyed by Fire. Where there is standing in close proximity to other property the wall of a building destroyed by fire, the fall of which must injure a neighbor, the landlord must pull down such wall or use such care in its maintenance as will absolutely prevent injuries, except from causes over which he can have no control, such as vis major, acts of public enemies, or wrongful acts of third persons which human foresight could not be reasonably expected to anticipate and prevent. (Mass.) Ainsworth v. Larkin, 314.

13. NEGLIGENCE in Manufacturing or Selling an Article—Third Person When may not Recover for.—Where a cause of injury is not in its nature imminently dangerous, where it does not depend on fraud, concealment, or implied invitation, and where the plaintiff is not in privity of contract with the defendant, an action for negligence cannot be maintained. (R. I.) McCaffrey v. Mossberg etc. Mfg. Co., 637.

14. MANUFACTURER OF MACHINE—When not Answerable to a Third Person for Defects in.—Negligence in the manufacture of a machine whereby an employe of the purchaser is injured will not sustain a recovery in favor of the latter against the manufacturer when the machine is not of an imminently dangerous character, as where it is a machine for use by a manufacturing jeweler, and, through a defect in the materials from which it was made, a hook broke and caused a weight to fall upon and injure an employe. (R. I.) McCaffrey v. Mossberg etc. Mfg. Co., 637.

15. NEGLIGENCE OF PARENTS Exposing Child to Injury in a Public Street—While the limited powers of the poor must be taken into account, as a general fact in drawing the line at which the responsibility of persons injuring a child in the public streets begins, still third persons cannot be held accountable for an accident from the fact that the parents of the child did the best they could. There is a certain minimum of precaution against danger into which infants will wander which must be taken into account before another is made to pay, (Mass.) Cotter v. Lynn etc. R. R. Co., 267.

16. NEGLIGENCE in the Care of Children—What is not.—Where a mother leaves her child, less than eighteen months of age, playing with other children in a neighbor's yard, between which and the street there is no fence or other obstruction, the street being a quiet one, it cannot be held, as a matter of law, that the child might dart out into the street before the mother saw it, or might fall to notice

it, though it went out so slowly that she was guilty of such negligence that the case should be taken from the jury, in an action to recover for damages sustained by it from being overrun in such street by defendant's wagon. (Mass.) *Walsh v. Loorem*, 263.

Negligence of the defendant, whether may be affirmed by the court as a proposition of law, 457.

See **Death**; **Druggists**; **Highways**; **Insurance**, 1; **Master and Servant**; **Railroads**.

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See **Bills and Notes**.

NUISANCES.

1. **NUISANCES**.—A Loud, Disagreeable Noise may create a nuisance, and be the subject of an action at law for damages, or a suit in equity for an injunction, or of an indictment as a public offense. (Ark.) *Ex parte Foote*, 63.

2. **NUISANCES**.—The Keeping of a Jackass Within the Limits of a Municipal Corporation may by it be declared to be a nuisance, and punishable as such. (Ark.) *Ex parte Foote*, 63.

3. **NUISANCE**—Prescription.—The Right to Maintain a Public nuisance cannot be acquired by prescription. Hence, the maintenance of an embankment and culvert across a public highway, however long continued, cannot result in the prescriptive right to so maintain them as to constitute a public nuisance. (Ind. App.) *Kelly v. Pittsburgh B. B. Co.*, 134.

Nuisance, municipal corporations, power to declare what is, 63.

See **Municipal Corporations**, 8-13.

OFFICERS.

1. **OFFICERS**—Liability for Moneys Stolen from.—If a statute, either in direct terms or from its general tenor, imposes a duty upon a public officer to pay over money received by him in his official capacity either for the public or private parties, the obligation thus imposed is an absolute one and binding on his sureties. The plea that the money has been stolen or lost without his fault does not constitute a defense to an action for its recovery. This rule applies to a clerk of a district court as to money received under condemnation proceedings. (Minn.) *Northern Pac. Ry. Co. v. Owens*, 336.

2. **PUBLIC OFFICERS**—Color of Office.—An appointment or election of one to an office that has no legal existence gives no color of existence to the office or color of authority to the person so appointed or elected. (Kan.) *In re Norton*, 255.

3. **A STATUTE OF LIMITATIONS** in Actions to Recover Moneys Misappropriated by an Official does not begin to run until the defalcation is discovered, where it was concealed by the principal by making false entries in his books, and he was of good repute for honesty. (Kan.) *McMullen v. Winfield Building etc. Assn.*, 236.

4. OFFICIAL BONDS—Acts in Private Capacity.—A constable, who receives money from a judgment debtor to stay execution and give time to perfect an appeal, acts in his private character. His sureties, therefore, are not liable for a conversion of the money. (Or.) *Feller v. Gates*, 492.

5. OFFICIAL BONDS—Burden of Proof Respecting the Date of a Misappropriation.—Where there are successive bonds, and money is traced to the principal and not accounted for, the burden is on him and his sureties to show what became of the money, and, failing to do this, the presumption is that the defalcation took place during the term covered by the bond. (Kan.) *McMullen v. Winfield Building etc. Assn.*, 236.

6. OFFICIAL BOND—Burden of Proving Whether Defalcations Occurred Before or After the Execution of a Bond.—Money which comes into an officer's hands before the execution of a bond is presumed to have been still in his possession, and the burden is upon his sureties to prove that defalcations by him occurred before the bond was given. (Kan.) *McMullen v. Winfield Building etc. Assn.*, 236.

7. OFFICIAL BOND—Interest, Whether Recoverable in Excess of the Penalty.—Where there is a defalcation equal to or in excess of the amount of the principal of an official bond, the amount of the recovery on the bond may include interest on the sum misappropriated from the date of the misappropriation. (Kan.) *McMullen v. Winfield Building etc. Assn.*, 236.

8. OFFICIAL BOND—When Retrospective.—A bond executed after the commencement of the year, reciting that the principal had been elected secretary of an association for the year beginning January 1st and ending December 31st, and declaring that if he should perform the duties of the office during such year, the bond should be void and of no effect, but otherwise should remain in force, is retrospective in its terms, and renders the sureties answerable for defalcations occurring within the year, but prior to the execution of the bond. (Kan.) *McMullen v. Winfield Building etc. Assn.*, 236.

See Courts; Public Officers; States.

Official Bonds, construction of, as against the sureties, 503.

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Official Bonds of treasurer, changes in duties for which sureties are liable, 506.

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PARENT AND CHILD.

See Negligence, 15, 16; Street Railways.

PARTITION.

1. PARTITION—Married Women.—A partition, deed or decree between tenants in common who are married women, including their husbands as decretal parties or joint grantees, carries no other or greater interest to the husbands than if the decree or deed had been made to their wives alone. Each wife thereafter holds her share in severalty, but no new title or additional estate is thereby conferred or created in favor of the husband. (Tenn.) Cottrell v. Griffiths, 748.

2. PARTITION.—Rules of Pleading, Practice and Evidence applicable generally to civil actions apply to an action for partition. (Minn.) McArthur v. Clark, 333.

3. PARTITION—Pleading and Proof—Adverse Possession.—A general allegation by a defendant in his answer to a suit in partition, of his ownership of the property, is sufficient to admit proof of his title by adverse possession, and the effect of such evidence is not only to bar plaintiff's right of action, but also to establish an absolute legal title in the defendant. (Minn.) McArthur v. Clark, 333.

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of mines, voluntary between cotenants of, 884.

PARTNERSHIP.

PARTNER'S LIABILITY After Dissolution of Firm.—One who makes two deposits with a banking firm of forty and thirty-five dollars each in one year is a "person," within the rule that a partner's liability continues after the dissolution of the firm "in favor of persons who have had dealings with, and given credit to, the partnership during its existence, until they have had personal notice of its dissolution. (S. Dak.) *Tobin v. McKinney*, 688.

PASSENGERS.

See Carriers.

PATENTS.

PATENT RIGHTS—Recovery of Purchase Price, Though Note Given Therefor is Void.—A statute requiring every negotiable instrument given for any patent medicine, implement, substance, or instrument of any kind to be executed upon a printed form, and to show on its face for what it was given, otherwise such instrument shall be void, does not prevent the vendor to whom an instrument was given, which did not comply with the statute, from maintaining an action for the purchase price. The object of the statute is to save to the vendee all the defenses he may have to an action on the note for the purchase money and to prevent the loss of such defense by a transferrer to an innocent holder before maturity. (Ark.) *Both v. Merchants' and Planters' Bank*, 80.

PAYMENT.

1. **PLEA OF PAYMENT** Admits the Debt and places the burden of proving payment on the defendant. (Tenn.) *Insurance Co. v. Dunscomb*, 769.

2. **THE PRESUMPTION** of Payment of a Debt, arising after sixteen years from its maturity, may be rebutted by any satisfactory evidence that the debt is still due. The condition of the debtor as to solvency, and the possession by the creditor of the evidence of the debt and valuable collateral security may repel the presumption of payment. (Tenn.) *Insurance Co. v. Dunscomb*, 769.

See Mortgages.

PERJURY.

1. **PERJURY—Indictment for—Words, How to be Set Out.**—Neither at the common law nor under the statutes generally prevailing in the United States is it necessary to set out the precise words of the testimony alleged to have been false. (R. I.) *State v. Terline*, 650.

2. **PERJURY in a Foreign Language—Indictment for.**—Though the testimony was given in a foreign language, it is not necessary, in an indictment for perjury, to show that fact or to state in such language the testimony alleged to have been false. It is sufficient to set out in English the substance of the testimony. (R. I.) *State v. Terline*, 650.

3. **PERJURY—Variance in Indictment for—When Immaterial.**—A mistake in an indictment for perjury respecting the testimony of

the accused, in so far as it related to a place or locality, is not descriptive of the identity of the offense, and is hence not a legal essential thereof. (R. I.) *State v. Terline*, 650.

PHYSICIANS AND SURGEONS.

MEDICAL SERVICES TO ANOTHER—Implied Promise to Pay for—When does not Exist.—An implied promise on the part of one who requests performance of medical or surgical services to another to pay for them does not arise unless the relation of the patient to the person making the request is such as raises a legal obligation on his part to call in a physician and pay for his services. (Mont.) *Spelman v. Gold Coin Min. etc. Co.*, 402.

See Corporations, 4, 5; Master and Servant, 11.

PLEADING.

1. **A PLEADING** Must be Construed most strongly against the pleader, and specific averments therein must be given precedence over general. (Ind. App.) *De Ruiter v. De Ruiter*, 107.

2. **PLEADING—One Averment, When not Sufficient to Overcome Another.**—If a pleading states that the defendant, at the time of making a conveyance, was largely indebted, and has since become, and now is, insolvent, and that he had not at the time of making such conveyance, nor has he now, sufficient property subject to execution to pay his debts and plaintiff's claim for alimony, and that he is possessed of a large amount of money and bonds which he secretes, this latter allegation is so indefinite and uncertain that it cannot be regarded as contradicting the essential averments preceding it. (Ind. App.) *De Ruiter v. De Ruiter*, 107.

3. **DUPLICITY OF PLEA to Bill to Restrain Nuisance.**—A plea to a bill by an adjoining property holder to restrain the erection of a building encroaching upon the public street is bad for duplicity, if it sets up that the complainant consented to the encroachment, and that he was not entitled to the light, air and view from that part of the street in front of the building. (Ala.) *First Nat. Bank v. Tyson*, 46.

4. **OWNERSHIP—Pleading.**—A general allegation of ownership of real property, in a pleading in either a legal or an equitable action, is sufficient to admit proof of any legal title held by the pleader. (Minn.) *McArthur v. Clark*, 333.

POSSESSION OF STOLEN GOODS.

See Larceny.

PRESCRIPTION.

See Nuisances; Public Lands.

PRIMARY ELECTIONS.

See Elections.

PRINCIPAL AND AGENT.

1. **EVIDENCE.**—The Declarations of One Assuming to Act as an Agent are not admissible to prove his agency. (R. I.) *Paulton v. Keith*, 624.

2. **AGENCY.**—No Person can Legally Act as an agent in a transaction in which he has an interest or to which he is a party on the side opposite to his principal. (N. J. L.) *Campbell v. Manufacturers' Nat. Bank*, 438.

3. **PRINCIPAL AND AGENT.**—Manager and Proprietor of Theater.—A manager of a theater who stands against the door of a stage and refuses to allow an officer to enter for the purpose of serving a writ upon an actor is not acting within the limits of the apparent scope and implied authority of his employment. (R. L.) *Paulton v. Keith*, 624.

4. **PRINCIPAL AND AGENT.**—The Powers of an Agent cannot be Enlarged by his unauthorized representations and promises. (Mont.) *Spelman v. Gold Coin Min. etc. Co.*, 402.

See Banks and Banking; Carriers, 18; Insurance, 5, 6.

PRINCIPAL AND SURETY.

1. **SURETIES.**—Negligence in not Discovering Defalcations of the Principal.—Though the books of the secretary of an association are open to the examination of its officers and members, and due diligence might have detected the dishonesty of the principal and prevented or reduced the amount of his defalcation, his sureties are not released, provided the association or its members did not act in bad faith toward the sureties, nor omit any effort to protect the funds of the association after receiving notice of the dishonesty and unfaithfulness of the secretary. (Kan.) *McMullen v. Winfield Building etc. Assn.*, 236.

2. **SURETIES.**—Statute of Limitations in Actions Against.—Where, Because of Fraud of a Principal in the concealing and misappropriation of money, the statute of limitations does not run against him, it does not run against the sureties on his bond. (Kan.) *McMullen v. Winfield Building etc. Assn.*, 236.

See Officers.

PRIVILEGED COMMUNICATIONS.

See Witnesses.

PROCESS.

1. **JURISDICTION.**—Affidavit for Publication of Summons, if defective, cannot be aided by reference to the other papers of record in the case for the purpose of conferring jurisdiction. (Minn.) *Gilmore v. Lampman*, 376.

2. **JURISDICTION.**—Affidavit for Publication of Summons which fails to state that the defendant has property within the state, or that the subject matter of the action is within the state, is fatally defective, and does not confer jurisdiction. (Minn.) *Gilmore v. Lampman*, 376.

3. **JURISDICTION.**—Constructive Service of Process is purely a statutory creation, in derogation of the common law, and the requirements of the statute must be strictly observed or the attempted service will be fatally defective. (Minn.) *Gilmore v. Lampman*, 376.

4. **JURISDICTION.**—Constructive Service of Process.—The affidavit for publication of summons is of itself the prerequisite upon

which jurisdiction is based, and it must contain and state positively all the facts required by the statute, otherwise it is fatally defective. (Minn.) *Gilmore v. Lampman*, 376.

5. **AN OFFICER** in the Service of Civil Process has the Right to Break Doors and command sufficient force to enter a theater or other building not occupied as a dwelling. (R. I.) *Paulton v. Keith*, 624.

See Principal and Agent, 3.

PUBLIC CONTRACTS.

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PUBLIC LANDS.

1. **PUBLIC LANDS.**—An Artificial Lake maintained on lands, the title of which is in the state, does not stamp on such lands the same character and trusts as if they were covered by a natural lake, unless the artificial lake is continued for a time sufficient to make it a natural lake by prescription. (Wis.) *Diana Shooting Club v. Lamoreux*, 898.

2. **PUBLIC LANDS**—Injury to Homestead.—An entryman under the federal homestead laws may bring an action for injury to his land, although he has not yet made final proof. (Wash.) *Wendel v. Spokane County*, 825.

3. **PUBLIC LAND** — Swamp Lands. — Decisions by the land department of the general government, as to whether lands were uplands or swamp lands within the meaning of a national swamp land act at the time it took effect, are conclusive in all courts and as to all parties, except a claimant by paramount title. (Wis.) *Diana Shooting Club v. Lamoreux*, 898.

4. **PUBLIC LANDS** — Title to Swamp Lands When Vests in State.—A national swamp land act vests in the state, as of the date it takes effect, the title to all lands determined by the general land department of the United States to be affected thereby. Such lands are thereafter segregated from the remainder of the public domain and vested in the state, whether or not they were at the time of the passage of such act artificially covered by navigable water, by trespassers upon the public lands. (Wis.) *Diana Shooting Club v. Lamoreux*, 893.

Public Officers, auditors, liability of sureties on bonds of, 571, 572.

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See Officers; Official Bonds.

PURE FOOD LAWS.

See Adulteration; Commerce.

QUIETING TITLE.

IN A SUIT TO QUIET TITLE, the Decree Should be Confined to the property and interests in issue. (Wash.) Cedar Canyon etc. Min. Co. v. Yarwood, 841.

RAILROADS.

1. RAILWAYS.—Conductors and Trainmen have the right to assume that the company would not permit any obstruction to remain above its tracks which would be dangerous to its employes while operating its trains. If there is such obstruction, and the company knows it, it is its duty to notify its trainmen of the danger, and it is no part of the trainmen's duty to anticipate such obstruction. (Ind. App.) Pittsburgh etc. Ry. Co. v. Parish, 120.

2. NEGLIGENCE, CONTRIBUTORY—Equal Means of Knowledge.—A railway employé injured by an obstruction on or over the track is not precluded from recovering therefor, on the ground that he had an equal means of knowledge with his employer of the existence of such obstruction, unless it was also his duty to use those means. (Ind. App.) Pittsburgh etc. Ry. Co. v. Parish, 120.

3. RAILWAYS.—The Duty of Making an Examination for the Purpose of Discovering Whether an Obstruction exists which is likely to render dangerous his performance of his duty by an employé rests upon the employer, and the employé is, therefore, not necessarily chargeable with contributory negligence because he did not make such examination or discovery. (Ind. App.) Pittsburgh etc. Ry. Co. v. Parish, 120.

4. RAILWAYS.—If the Limbs of a Tree Extend Over a Railway Track, Though Its Body does not Stand on the Right of Way, and such limbs constitute a constant danger to the lives of employes when on the top of freight-cars, and are of sufficient size and strength to push a man off of the top of a car running from three to six miles an hour, the railway has a right to remove such dangerous

overhanging limbs, and, failing to do so, is guilty of negligence, for which its employ  s may recover if injured thereby. (Ind. App.) Pittsburgh etc. Ry. Co. v. Parish, 120.

5. NEGLIGENCE, CONTRIBUTORY—Absence of, How may be Established.—The absence of contributory negligence may be established by circumstantial evidence. When it appears from the evidence that a railway conductor was pushed from the top of a slowly moving train by the limbs of a tree overhanging the track, and that he was a sober, careful, competent, and experienced man, and was in the proper place and in the performance of work in the line of his duty, and had never been warned of the existence of the danger, and that a witness saw the motion of a man's arm, and branches of the tree moving, and a lantern fall, the jury is warranted in finding that the conductor, at the time of his injury, was not chargeable with contributory negligence. (Ind. App.) Pittsburgh etc. Ry. Co. v. Parish, 120.

6. NEGLIGENCE — Absence of Warning.—Evidence that a conductor injured by being pushed from the top of a moving train by the overhanging limbs of a tree had not been notified of the existence of this obstruction is admissible. It was not such a danger as is ordinarily incident to the business of railroading, and if the corporation knew of its existence, it should have informed its employ  s. (Ind. App.) Pittsburgh etc. Ry. Co. v. Parish, 120.

7. NEGLIGENCE.—Evidence that a Railway Had not Erected Any Warners or Tell-tales on either side of a tree by the overhanging limbs of which an employ   was injured, is admissible. Though the failure to erect them may not be negligence, their absence tends to prove that the decedent did not know of such obstruction, and had not been warned of the existence of danger. (Ind. App.) Pittsburgh etc. Ry. Co. v. Parish, 120.

8. NEGLIGENCE, CONTRIBUTORY—When a Question for the Jury.—Whether an obstruction on the line of a railway track consisting of the limbs of a tree overhanging the track, so as to push from the top of a car an employ   thereon, is an open and obvious defect, and the danger therefrom apparent, is a question for the jury, and their finding upon it cannot be ignored. (Ind. App.) Pittsburgh etc. Ry. Co. v. Parish, 120.

9. RAILWAYS — Trees Overhanging Track — Employ  s are not Bound to Know of.—Trees overhanging a railway track are not such an open and obvious obstruction that the court can say, as a matter of law, that an employ   in the discharge of his duties is bound to see them, and is therefore chargeable with knowledge of the danger from them. (Ind. App.) Pittsburgh etc. Ry. Co. v. Parish, 120.

10. RAILWAYS.—Trees Overhanging a Track so Low that they come in contact with and injure employ  s while engaged in their duties on the tops of cars are not dangers incident to the service, nor are they dangers of which employ  s are presumed to know; and hence they are entitled to recover for injuries suffered therefrom if themselves free from contributory negligence. (Ind. App.) Pittsburgh etc. Ry. Co. v. Parish, 120.

See Carriers; Insurance, 1; Street Railways.

RECEIVERS.

1. A RECEIVER of a Corporation has no right to sue outside of the jurisdiction appointing him, unless he is actually or virtually an assignee of the claim upon which he brings the action. (Mass.) Homer v. Barr Pumping Engine Co., 269.

2. RECEIVER—Pleading in Actions by.—In an action by a receiver of a foreign corporation, he must, under the general denial, prove that he is authorized to bring actions in his own name in the courts of the state. (Mass.) *Homer v. Barr Pumping Engine Co.*, 262.

REFERENCE.

See Arbitration and Award.

REPLEVIN.

See Confusion of Goods.

RES GESTA.

See Evidence, 4.

RES JUDICATA.

See Judgments.

SALES.

1. SALE—Implied Warranty.—On a sale of onion sets to a merchant by description, there is an implied warranty that they shall answer the description and be merchantable. (Ala.) *Frith & Co. v. Hollan*, 54.

2. SALE—Remedies of Buyer for Breach of Warranty.—A merchant, finding goods purchased by him to be in a bad condition, and part of them unmerchantable, may rescind the sale and return the goods, or retain them, and when sued for the price, avail himself of the damages suffered, either by bringing his cross-action for the breach of warranty, or by proving their real value and abating the recovery pro tanto. (Ala.) *Frith & Co. v. Hollan*, 54.

3. CONSIGNOR AND CONSIGNEE—Liability for Failure of Title.—Neither the payee nor a bank collecting a draft drawn by the consignor of grain and accompanying a bill of lading is liable to the consignee accepting and paying the draft for a failure of title to the property described in such bill. (Kan.) *Hall v. Keller*, 209.

SELF-DEFENSE.

See Homicide, 5, 6.

SENTENCE.

See Criminal Law, 8, 9.

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SLANDER.

See Libel and Slander.

STATES.

1. STATE OFFICERS, Contracts with — Conditions Which may not be Inserted In.—Where a state board has accepted a bid and awarded a contract, it has no power to insert in the formal written contract any condition not consonant with the contract already made by virtue of the acceptance of the bid, though such contract is subject to the approval of the governor and the state treasurer. (Mont.) *State v. Toole*, 386.

2. STATE OFFICERS—Contracts—Power of to Cancel.—A state furnishing board has no power to cancel a contract created by the acceptance of a bid, unless for some cause which the law recognizes as sufficient to invalidate the contract. (Mont.) *State v. Toole*, 386.

3. PUBLIC CONTRACTS—Defects in Advertising for.—If a statute declares that before any contract is let, the board must adver-

tise in two daily newspapers printed in the state, one of which must be printed at the seat of government, the letting of a contract based on an advertisement only in a newspaper printed at the seat of government is unauthorized and void. (Mont.) *State v. Toole*, 386.

4. **PUBLIC CONTRACTS.—Letting by Contract to the Lowest Bidder Necessarily Implies Equal opportunities to, and freedom in, all whose interests or inclinations may impel them to compete at the bidding.** (Mont.) *State v. Toole*, 386.

5. **PUBLIC CONTRACTS.—Limiting of to Persons Employing Union Labor Only.**—A contract entered into by the acceptance of a bid for public work tendered in pursuance of an advertisement limiting the right to bid to persons employing, or who will in the future employ, union labor only, is void. (Mont.) *State v. Toole*, 386.

6. **PUBLIC CONTRACTS.—Reasons for Canceling Need not be Correctly Stated at the Time.**—Although the reason given at the time of the attempted canceling of a public contract is not valid, yet the canceling may be sustained if there was another cause sufficient to render the contract void. (Mont.) *State v. Toole*, 386.

7. **PUBLIC CONTRACT.—Right to Refuse to Complete Because Labor Unions were Hostile to the Accepted Bidder.**—A state furnishing board has no power or discretion to refuse to enter into a written contract in pursuance of an award theretofore made by it on the ground that the other contracting party is in hostility to labor unions, and may therefore be embarrassed and delayed in complying with his contracts because of strikes and labor troubles. (Mont.) *State v. Toole*, 386.

8. **CONSTITUTIONAL LAW.—Advertising for Proposals.—Power of the Legislature to Require.**—A constitutional provision requiring contracts for materials to be given to the lowest responsible bidder under such regulations as may be prescribed by law does not prohibit the legislature from providing that, before any contract is let, an advertisement inviting proposals therefor must be published for twenty days in two newspapers. (Mont.) *State v. Toole*, 386.

STATUTES.

1. **CONSTITUTIONAL LAW.—Title of Act.—Primary Purposes.**—The statement of the primary object in the title of an act as being the creation of a corporation for manufacturing purposes suggests, as germane thereto, and as part of the expressed purpose, authority to acquire and maintain a dam to create power for the use of the corporation, to acquire lands affected by the backwater of such dam, and authority in the owners of such lands to sell them to the corporation. (Wis.) *Diana Shooting Club v. Lamoreux*, 898.

2. **CONSTITUTIONAL LAW.—Title of Act.**—The constitution requires the subject of an act to be expressed in its title, but leaves the mode of expressing it wholly to the discretion of the legislature. (Wis.) *Diana Shooting Club v. Lamoreux*, 898.

3. **CONSTITUTIONAL LAW.—Title of Statute.**—Every subject which the court can see would or might facilitate the accomplishment of the primary purpose named in the title of an act is germane thereto, and may be considered as constitutionally suggested by the expression of such primary purpose. (Wis.) *Diana Shooting Club v. Lamoreux*, 898.

4. **CONSTITUTIONAL LAW.—Title of Statute.**—The title of an act should be liberally construed, and not be condemned as insuf-

ficient to constitutionally suggest those things found in the body of the act, unless, giving thereto the largest scope which reason will permit, something is found therein which is neither within its literal meaning nor its spirit, nor germane thereto. (Wis.) *Diana Shooting Club v. Lamoreux*, 898.

5. **PURE FOOD LAW**—Title of.—It is not necessary to set forth in the title of a pure food statute the nature and character of the penalties provided. (Wash.) *Hathaway v. McDonald*, 889.

6. **TITLE OF PRIMARY ELECTION LAW**.—A section of a statute relating to the appointment of a county managing committee, and its functions and duties, is within the purview of the title of an act, "To provide for primary elections in cities . . . and providing for the manner of conducting the same," etc. (Or.) *Ladd v. Holmes*, 457.

See Constitutional Law.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STREET RAILWAYS.

1. **CHILD**—Negligence of Parent—When Precludes Recovery for Injuries to.—If a child is injured in a public street by collision with a street-car, and there is no evidence that the child used the care which would be expected of an adult, if there is negligence on the part of its parents in allowing it to be where it was, it cannot recover. (Mass.) *Cotter v. Lynn etc. R. R. Co.*, 267.

2. **NEGLIGENCE OF PARENTS** Which Precludes Recovery by Child.—If a child less than three years old is left unattended in a yard fronting on a public street, in which there is considerable teaming and a line of electric-cars, between which yard and street there is a gate always open, and the child strays out into the street, and, in trying to return, is run over and injured by a car, the negligence of the parents is such as to preclude any recovery by a child, where it was not using the care of a prudent person. (Mass.) *Cotter v. Lynn etc. R. R. Co.*, 267.

See Evidence, 2.

STREETS.

See Highways; Municipal Corporations.

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See Official Bonds.

SWAMP LANDS.

See Public Lands.

TAXATION.

1. TAXATION, DOUBLE—What is not.—A statute requiring persons keeping and using wheeled vehicles in a city to pay a tax for that privilege, such tax, when collected, to be appropriated exclusively for repairing and improving streets, does not authorize double taxation, though such property is also assessed in proportion to its value, and a tax levied thereon. The tax thus authorized to be imposed by the city is in the nature of a toll for the use of its improved streets. (Ark.) *Fort Smith v. Scruggs*, 100.

2. TAX TITLE—Who may Acquire.—One who is under no obligation to pay taxes may strengthen his title to lands by purchasing at a tax sale. Hence, if he is in possession as grantee of the owner of a life estate under a conveyance purporting to convey in fee, and is holding adversely to the remaindermen, he may purchase and assert an outstanding tax title, created when he was not in possession and was under no obligation to pay taxes. (Ark.) *McFarlane v. Grober*, 84.

See Municipal Corporations, 15, 16.

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TELEGRAPHS AND TELEPHONES.

1. TELEGRAPH COMPANIES—Delay in Delivery—Person Injured.—The sender of a telegraph message is a person aggrieved by negligent delay in its transmission and delivery. (Tenn.) *Gray v. Telegraph Co.*, 706.

2. TELEGRAPH COMPANIES—Interstate Commerce—Delay in Delivery of Messages.—A statute enforcing the prompt delivery of telegraph messages and making the company guilty of a misdemeanor and liable in damages for a failure to deliver messages promptly, is not an unlawful interference with interstate commerce when applied to messages sent from one state for delivery in the state enacting such statute. (Tenn.) *Gray v. Telegraph Co.*, 706.

3. TELEGRAPH COMPANIES—Recovery for Mental Anguish—Conflict of Laws.—The sender of a telegraph message from one state to a point in another state may recover in the latter state for mental anguish suffered through negligent delay in the delivery of the message, when such recovery is authorized by the statutes of that state, although in the state from which the message was sent no recovery can be had for mental anguish. (Tenn.) *Gray v. Telegraph Co.*, 706.

4. TELEGRAPH COMPANIES—Delivery of Check to Wrong Person—Innocent Purchaser.—If a telegraph company, upon an order, issues and delivers its check to the wrong person by mistake, it is liable thereon to an innocent purchaser who takes the check from the holder upon his indorsement. It is presumed in favor of such purchaser that the indorser is the payee intended, especially when the purchaser has identified him as the person to whom the check was delivered as payee. (Minn.) *Burrows v. Western Union Tel. Co.*, 380.

Telegraph Corporations, conflict of laws as to measure of damages in actions against, 725, 726.

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See Mines and Minerals.

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See Principal and Agent, 2.

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See Confusion of Goods; Trover and Conversion.

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TRESPASS.

1. TRESPASS.—Any Wrongful Intrusion upon the right of another is both an injury and a damage, and is a proper subject for legal redress. (Wis.) *Diana Shooting Club v. Lamoreux*, 898.

2. TRESPASS—Hunting.—Any wrongful intrusion upon the right to use land for fishing and hunting is actionable, no matter as to the amount of damages caused by such invasion. (Wis.) *Diana Shooting Club v. Lamoreux*, 898.

3. TRESPASS.—State License to Hunt confers no right upon the holder to go upon private lands without the permission of the owner. (Wis.) *Diana Shooting Club v. Lamoreux*, 898.

TRIAL.

1. TRIAL.—Instructions need not be given when there is no evidence upon which to base them. (Utah) *Downey v. Gemini Min. Co.*, 798.

2. JURY TRIAL.—Abstract Instructions, not Supported by the Evidence, are Erroneous, and require a reversal, as where the jury is charged that they should find against a railway corporation, if its agent used toward or to a plaintiff, or in her hearing, any profane, obscene, or boisterous language, which insulted her or injured her feelings, when there is no evidence of the use of any such language. (Ark.) *St. Louis etc. Ry. Co. v. Wilson*, 74.

3. JURY TRIAL.—An instruction cannot be regarded as erroneous and entitling the appellant to a reversal of the judgment or to a new trial, because it states some of the material facts and omits others, if, taken in connection with other instructions, the whole of the law and the facts were sufficiently disclosed. (Ind. App.) *Pittsburgh etc. Ry. Co. v. Parish*, 120.

4. JURY TRIAL.—Argumentative Instructions are properly refused. (Ala.) *Campbell v. State*, 17.

5. JURY TRIAL.—Instructions not Applicable to the Evidence.—An instruction that if the jury find that one under whom the defendant claims held actual, continuous, adverse, and uninterrupted possession for more than ten years before the commencement of the suit, the verdict should be for the defendant, is abstract, and constitutes reversible error, when there is no evidence of such a holding, and the undisputed testimony shows that the lands were wild and unoccupied. (Ark.) *Rust Land etc. Co. v. Isom*, 68.

6. JURY TRIAL.—Instructions not Technically but Substantially Accurate.—Though the trial court instructed the jury that they should allow interest from the date of the injury to the date of the verdict in estimating the amount of damages, when it should have instructed them that they should take into account the lapse of time and put plaintiff in as good position as if the damage had been paid immediately, a new trial will not be granted if there is nothing to indicate that the defendant was injured by the instruction. (Mass.) *Ainsworth v. Lakin*, 314.

7. TRIAL—Question for Jury.—A pure issue of fact must be submitted to the jury, and it is reversible error for the court to take the question thus involved away from and direct the verdict. (Minn.) *Magoun v. Fireman's Fund Ins. Co.*, 370.

See Criminal Law.

TROVER AND CONVERSION.

CONVERSION OF STANDING TIMBER—Damages.—If one under the mistaken idea that standing timber is his, converts it into cordwood, the measure of damages is the value of the timber standing. (Wash.) *Chappell v. Puget Sound Reduction Co.*, 820.

See Confusion of Goods.

TRUSTS.

1. LIMITATION OF ACTIONS Against Trust.—The rule that the statute of limitations does not bar a trust estate holds only between the trustee and cestui que trust, and not as between such parties on one side and strangers on the other. (Utah) *Jenkins v. Jensen*, 783.

2. LIMITATION OF ACTIONS—Trustee and Minor Cestui Que Trust.—Whenever the right of action in a trustee is barred by the statute of limitations, the right of a minor cestui que trust represented by him is also barred. (Utah) *Jenkins v. Jensen*, 783.

UNDUE INFLUENCE.

See Deeds.

USURY.

USURY—Subterfuge.—Usury is a Moral Taint Wherever it exists, and no subterfuge should be permitted to conceal it from the eyes of the law. (Or.) *Pacific States Savings etc. Co. v. Hill*, 477.

Usury, agreement to pay higher interest upon default, whether offends law against, 588, 589.

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See Building and Loan Associations.

VACCINATION.

See Health.

VENDOR AND VENDEE.

1. VENDOR AND VENDEE—Covenant for Title When Applies to the Time of Conveying Rather than to that of the Contract of Sale. If a contract for the sale of real property provides for the payment of part of the purchase price at a subsequent date, and that thereupon the vendor will convey "a good and clear title free from all encumbrances," the vendor is answerable for any encumbrance or failure of title arising after the sale and before the making of the deed, though not due to his fault, as where part of the property is taken for a public street. (Mass.) *Kares v. Covell*, 271.

2. VENDOR AND VENDEE—Partial Failure of Title Arising After the Contract of Purchase Was Made.—Though, when a contract to convey is made, the vendor's title is perfect, yet if afterward part of the property is lost to him by being taken for the widening of a street, the vendee may recover damages for the part thus taken, if the vendor covenanted to convey a good title free from all encumbrances. (Mass.) *Kares v. Covell*, 271.

3. VENDOR AND VENDEE—Partial Failure of Title.—If a vendor cannot convey all of the property according to his contract, there is a partial failure of consideration, for which the vendee may, at his election, hold the vendor liable in damages, or rescind and recover the purchase price, if the parties can be put in statu quo. (Mass.) *Kares v. Covell*, 271.

VOTING.

See Elections.

Warranty implied on the sale of goods by description, 55.

See Insurance; Sales.

WATERS AND WATERCOURSES.

WATERS AND WATERCOURSES—Statute of Limitations.—Although an artificial condition of water may, by prescriptive right, become a natural condition as regards public rights, yet this is not so in the absence of elements necessary to change the title to the lands by operation of the statute of limitations. (Wis.) *Diana Shooting Club v. Lamoreux*, 898.

See Municipal Corporations; Navigable Waters; Public Lands. Waste, by a cotenant of a mine, what constitutes, 869.

WILLS.

1. WILLS.—A Devise to Nephews does not include grandnephews, unless there is something in the context to show that the testator intended to include them, or there is such an ambiguity as to authorize extrinsic evidence for the purpose of showing that the grandnephews were intended to be included. (Iowa) *Downing v. Nicholson*, 175.

2. WILLS—Devise to Class—Construction of.—Since a will speaks from the date of the testator's death, the members of a class, where there is a devise to a class, must, prima facie, be determined upon the death of the testator. If, however, the will indicates a contrary intent, that intent will be adopted and given effect. (Iowa) *Downing v. Nicholson*, 175.

3. WILLS.—A Devise to a Class, One of the Members of Which is Dead When the Will is Executed, cannot operate for the benefit of his heirs, though the statute of the state declares that if a devisee dies before the testator, his heirs shall inherit the property devised to him, unless, from the terms of the will, a contrary intent is manifest. Therefore, a devise to the testator's nephews and nieces cannot benefit a son of a niece who died long before the will was made. (Iowa.) *Downing v. Nicholson*, 175.

4. WILLS—Devise to a Class, Whether Affected by Statute Providing that Heirs of a Deceased Devisee May Inherit His Share.—As a general rule, a statute providing that if a devisee dies before

the testator, his heirs inherit the property, unless a contrary intent appears from the will, applies to devises to a class as well as to devises where the devisees are specially named. (Iowa) *Downing v. Nicholson*, 175.

5. **WILLS—Cancellation.**—A written declaration signed by the testator that "this will is null and void," following his signature to an instrument, otherwise perfect as his will, together with his declaration that he had "defaced" and "killed" such will, is sufficient to cancel and revoke it, although the testator kept it in his possession in a locked drawer, and in such condition, until his death. (Tenn.) *Billington v. Jones*, 751.

Wills, revocation of by unattested indorsements upon, 754.

See **Deeds**.

WITNESSES.

1. **WITNESS—Testimony Against a Deceased Person.**—Under a statute prohibiting a person from being examined as a witness as to any transaction between him and a decedent against an executor, administrator, or next of kin, or other survivor, such person may be examined as to a conversation between decedent and another person occurring in the presence of the witness, but in which he did not participate. (Iowa) *Mallow v. Walker*, 158.

2. **ATTORNEY AND CLIENT—Confidential Communications.**—If an attorney's services in a transaction are rendered to several persons, confidential communications to him in regard thereto, in which all such persons are interested, cannot be disclosed, unless all join in consenting thereto. (Wis.) *Herman v. Schlesinger*, 922.

3. **ATTORNEY AND CLIENT—Confidential Communications.**—The successor of a person acting in a representative capacity, such as an assignee, cannot waive the privilege of his predecessor as to secrecy in regard to privileged communications made by the latter to his attorney while he is in office. (Wis.) *Herman v. Schlesinger*, 922.

4. **ATTORNEY AND CLIENT—Privileged Communications.**—A client, by procuring his attorney to sign, as a subscribing witness, an instrument evidencing an agreement or transaction between such client and a third person, in the making of which and reduction whereof to writing such attorney served such client in his professional capacity, does not waive his privilege of secrecy in respect to confidential communications made during the preparation of the instrument or agreement. (Wis.) *Herman v. Schlesinger*, 922.

5. **ATTORNEY AND CLIENT—Confidential Communications.**—The privilege of confidential communications between attorney and client does not extend to the question whether, in the preparation of a cause for trial, the client was interrogated as to his knowledge respecting the matters involved, and the questions and answers thereto reduced to writing, thus enabling the attorney to know what his client might be expected to testify to. (Wis.) *Herman v. Schlesinger*, 922.

6. **ATTORNEY AND CLIENT—Privileged Communications—Third Persons.**—If a person employs an attorney in his professional capacity in a transaction between such person and another, the attorney is not privileged from disclosing the communications which pass between him and the third person in regard to such employment. The privilege of secrecy, as to transactions between attorney and

client, is limited to communications made by the latter to the former and to the former's advice thereon, in the course of his professional employment. (Wis.) *Herman v. Schlesinger*, 922.

7. **WITNESSES.**—A Party is Bound by the Testimony of his own witness, when his is the only evidence on the point introduced. (Wash.) *Chappell v. Puget Sound etc. Co.*, 820.

8. **WITNESS.**—Cross-examination for the Purpose of Degrading.—The court ought not, on cross-examination of a witness, permit his past life to be ransacked and his misdeeds brought before the jury for the purpose of disgracing or degrading him in their eyes. (R. I.) *Kolb v. Union R. R. Co.*, 614.

9. **WITNESS.**—If the impeachment of a prosecuting witness is attempted by showing contradictory statements out of court, the state may show that prior to such statements he made others consistent with his testimony at the trial. (S. Dak.) *State v. Caddy*, 666.

10. **IMPEACHING BY EVIDENCE of Specific Acts of Misconduct and of General Reputation.**—Specific acts of misconduct committed by a witness who is a party to a suit may be shown where the act has some relation to, or some bearing upon, an issue involved in the case, and his general reputation as to the particular trait of character involved may also be shown. (R. I.) *Kolb v. Union R. R. Co.*, 614.

11. **WITNESS.**—Impeaching by Showing Want of Chastity.—In an action by an administratrix of a decedent as his widow and also for the benefit of his minor children to recover for his death caused by the defendant's negligence, it is error to require her to answer whether she had borne an illegitimate child since his death. Such evidence is not admissible for the purpose of impeaching her, and for any other purpose is immaterial. (R. I.) *Kolb v. Union R. R. Co.*, 614.

Witness, absent, evidence of at a former trial, when admissible at a subsequent, 195.

at a former trial, evidence of, when admissible in a different suit, 197-200.

cross-examination of, failure to make does not prevent testimony from being admissible on a second trial, 200, 201.

deceased, evidence of at a former trial, when admissible in a subsequent, 193, 194.

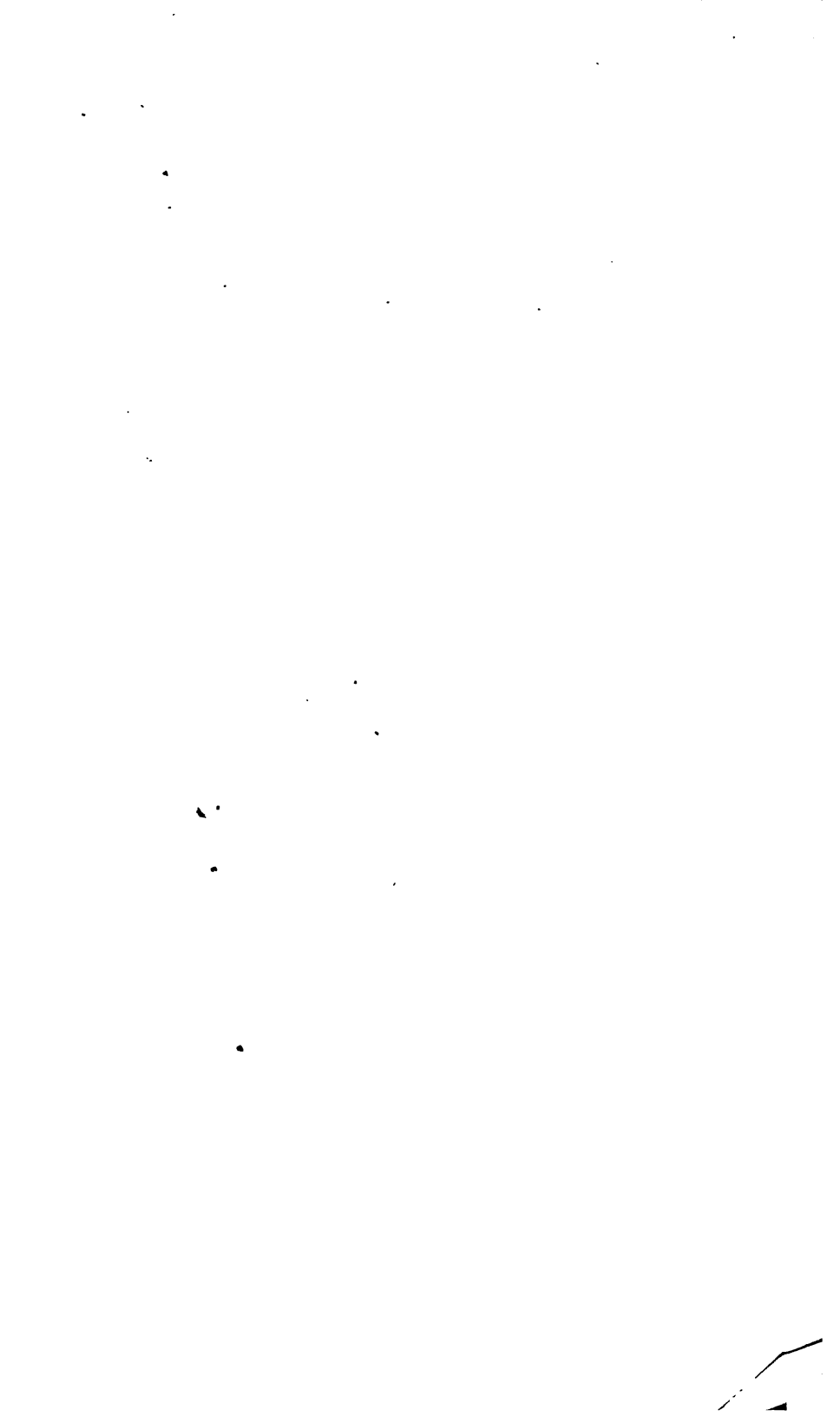
deceased, evidence of at a subsequent trial, against whom may be admitted, 202.

evidence of death, absence, or disability, what sufficient to sustain reception of evidence at a second trial, 203.

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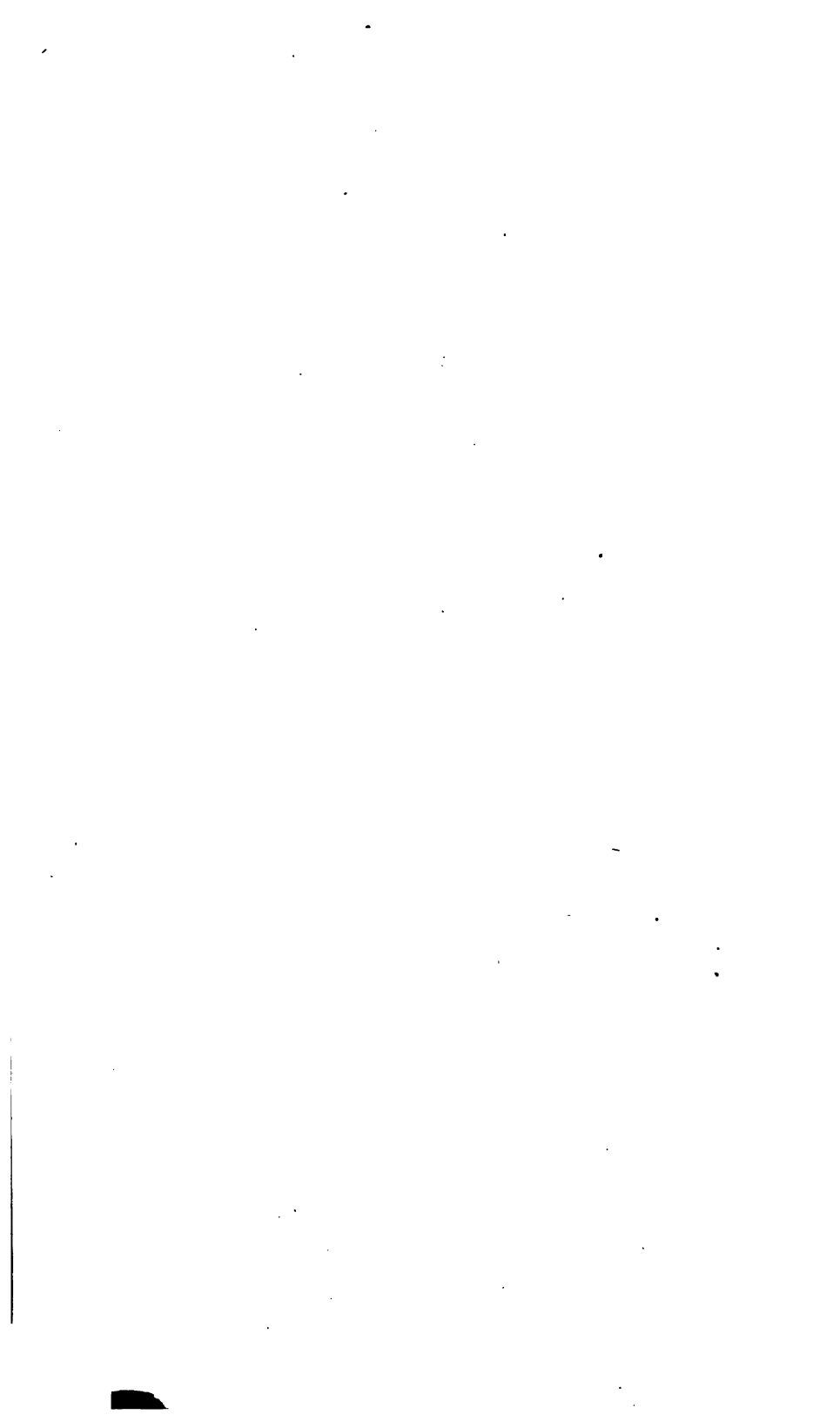
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See Evidence.













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